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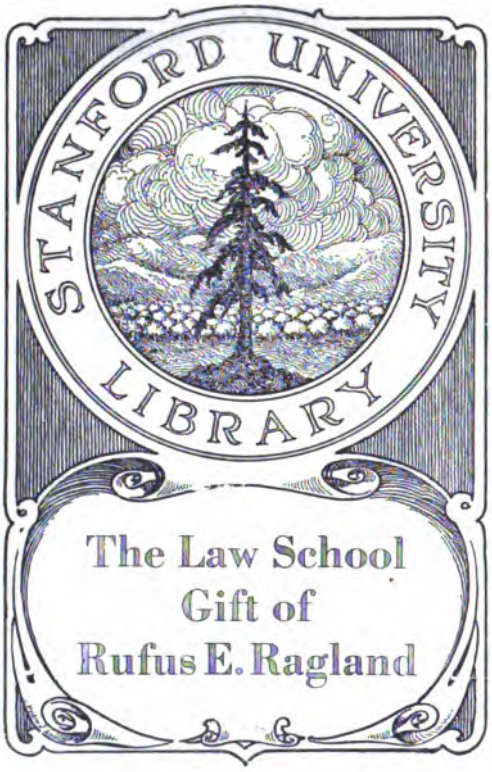

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# TREATISE

ON

# CHATTEL MORTGAGES

By

HENRY M. HERMAN,

AUTHOR OF "THE LAW OF EXECUTIONS," ETC.

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1878.

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TO

**Cassius C. Foster,**

JUDGE OF THE UNITED STATES DISTRICT COURT FOR KANSAS,

THIS BOOK IS DEDICATED, AS A TRIBUTE TO HIS HIGH JUDICIAL CHARACTER, AND AS A TESTIMONIAL OF THE AUTHOR'S PERSONAL REGARD.

# PREFACE.

THE author does not deem it necessary to offer any apology for this work. "While of the making of law books there is no end," there are certain subjects that require a work devoted exclusively to their treatment. The mass of contradictory authorities, the chaotic state of the decisions upon the class of securities treated of in this work, have more than convinced its author of the necessity of a work of this kind. In the plan adopted, and in the manner of arranging the subjects treated of, he has adopted a system peculiarly his own. The great difficulty he has had to overcome has been to utilize the mass of matter which had been collected. That he has succeeded in so doing he does not believe, but that he has established a foundation for the efforts of some abler mind he does not doubt. The material has been used as seemed to the best advantage, and may have resulted in the advancement of seemingly novel doctrines.

His purpose has been to furnish the profession with a series of uniform principles, which, independent of statutory enactments as to matters of form, shall be of general application to this class of securities. His discussions and conclusions are not theoretical, but are based upon a careful analysis, examination and comparison of the decided cases. The civil, common and statute law, as well as the decided cases, have been freely drawn upon, while the harsh doctrines of the common law are being constantly and gradually relaxed and modified. The civil-law rules are re-affirmed in the later and better considered cases, and chattel mortgages without change of possession, instead of being fraudulent *per se*, are, under the registration laws, regarded as eminently proper. While his aim has been to deduce the true principles of interpretation and to establish from the cases uniform doctrines, which shall be applicable to all the questions appertaining to the subject, he has not scrupled to express his own views and opinions, which are so marked and represented that they cannot be blended with the results of judicial determination so as to induce the reader to accept them in lieu of settled law. While the aim of the author has been to prepare a book of prac-

tical use for the profession, he trusts that its use may tend to create a system whereby the rights, remedies and liabilities of parties to this class of securities may become unified, and the obsolete and conflicting decisions discarded forever as precedents.

He believes that his views are correct on principle. The mass of overruled cases prove that courts are not infallible, and precedents not always true statements of the law. The civil law, common law and statute law relating to chattel mortgages, in connection with the decided cases, have been examined as far as practicable, and from these sources he has endeavored to treat his subject. That a chattel mortgage is a mere contract of hypothecation—a mere security—and that a mortgagee's rights are no greater after condition broken, until by foreclosure he has rendered his security available to the satisfaction of his debt, may be a startling innovation in the jurisprudence of many States, but the wisdom and enlightenment of modern jurists coincide with this view. That the ancient doctrines of absolute forfeiture upon breach of condition are rapidly becoming obsolete no one can doubt who has specially studied the subject. If any strange or new doctrines have been ad-

vanced it is for the reason that it is believed the law will be so announced in the future. That there may be grave differences of opinion cannot be doubted, notwithstanding the belief that the true principles of law and equity governing chattel mortgages have been correctly stated. That there are errors and omissions cannot be doubted, as it is next to impossible to make a work of this kind absolutely perfect. In presenting this work to that generous profession, who, by their favorable reception of the author's previous works, have acknowledged the utility of his labors in their behalf, he trusts that the errors will not be regarded as impairing its value, while, if his efforts in its preparation will materially lessen the arduous labors of an overworked Bench and Bar, and assist them (however slightly) in bringing order out of chaos, he will feel amply rewarded for the onerous labor its preparation has imposed upon him.

H. M. HERMAN.

LEAVENWORTH, Kan., May, 1877.

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Mortgagor's Title or Right of Redemption Continues until Foreclosure.—Rule should be same at Law as at Equity.—Rights and Liabilities of a Mortgagor.—When a Mortgagor is Entitled to Relief.—When and when not Chargeable with Loss.—Infant Mortgagor, when Estopped from Contesting Mortgage, ..... Page 441–478

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# CHATTEL MORTGAGES.

# CHATTEL MORTGAGES.

## BOOK I.

### CHAPTER I.

DERIVATION OF CHATTEL MORTGAGE.—DEFINITION OF A CHATTEL.—CLASSIFICATION OF PROPERTY.—PERSONAL AND REAL PROPERTY CHATTELS.—FIXTURES.—ROLLING STOCK.—DEFINITION OF MORTGAGE.—ORIGIN AND NATURE OF MORTGAGES.—HISTORY OF ANCIENT AND MODERN RULES GOVERNING.—CIVIL LAW DOCTRINES, ETC., ETC.

§ 1. **Chattel-Mortgage** is a compound word, formed, of the two words chattel and mortgage. In order to arrive at a correct definition of a chattel-mortgage, it will be necessary to ascertain the nature of a chattel and the nature of a mortgage. A general definition of a chattel may be given, as follows: every species of property, except the freehold or things which are parcel of it, is a chattel.

§ 2. **At Common Law**, property was divided into two classes—1st, Real property; 2nd, Personal property.

§ 3. **Real Property**, or land, is defined as any ground, soil or earth whatsoever; as meadows, pastures, woods, etc., and everything annexed to it, whether by nature as trees, water, etc., or by the hand of man, as buildings, fences, etc. It has an indefinite extent upwards as well as downwards. It legally includes all buildings standing or built on it, trees, fixtures and fences upon it, and whatever is in a direct line between the surface and

centre of the earth. The term "real estate" is co-extensive in meaning with lands, tenements, and hereditaments; and when applied to an interest in lands or other real property, includes all estates or interests in such real property which are held for life, or some greater estate, but does not embrace terms for years and other chattel interests in land.[1]

§ 4. **Personal Property or Chattels.**—This species of property usually consists of things temporal and movable, and includes all subjects not of a freehold nature or descendible to the heirs at law. It includes not only everything movable and tangible which can be the subject of property, but may include things *quasi* movable, as tenants' fixtures, and *quasi* tangible, as choses in action. It is the right or interest which one has in things personal; the right or interest less than a freehold which one has in realty, or any right or interest which one has in things movable. Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property one can have in things personal is personal property. The essential idea of personal property is that of property in a thing movable, or separable from the realty; or perishability or possibility of brief duration of interest, as compared with the owner's life, in a thing real, without any action on the part of the owner." It embraces not only goods, chattels, coins, bills, and evidences of debt, but, in the strict and more appropriate legal definition, signifies the right and interest of the owner in these articles.[2]

§ 5. **Of the Classes of Personal Property.**—Personal property is subdivided into two great classes, viz.:

1 Herman on Executions, p. 178. 2 Id., p. 143.

chattels Real and chattels Personal. The word chattel is a very comprehensive one, and has been extended so as to comprise every species of property, movable or immovable, which is less than a freehold. It is a more extensive term than goods and effects, and is synonymous with personal property.

§ 6. **Chattels Real.**—This class of chattels are such as concern and savor only of the realty, are immovable, and include all interests in the subject of real estate or real property which are less than a freehold, as estates for years, etc. An estate for years is a chattel real. Being an interest in land, it has the quality of *immobility*, which constitutes its real; but having no indeterminate duration, it does not obtain the character of a freehold, but is a mere chattel. It is an interest in land by virtue of a contract for the possession of it for a limited period of time, and is known generally as a *term*. The length of time for which the estate is to endure is of no importance in the ascertainment of its character, unless determined by statute.

§ 7. **Chattels Personal.**—All property which does not belong to the class of Real property, or to that of chattels real, is included in the term chattels personal. Chattels personal include movable things only, as belonging immediately to the person; chattels personal consist, therefore, in part of things, as said by Lord Coke, *quæ se movent* and things *quæ ab aliis moventur*. Thus cattle, goods, wares and merchandise, furniture, books, food, money, ships, emblements, trees, sold or reserved upon a sale, are chattels personal. They consist, also, in part of things, which exist only in contemplation of law; as, *choses in action*, patents, copyrights and the like.

By emblements is meant a crop growing upon land—

that is, all such crops as, in the ordinary course of things, return the labor and expense bestowed upon them within the current year, consisting of grain, beans, hemp, flax, peas, etc., and annual roots, such as potatoes, turnips, etc., as well as the artificial grasses.[1]

But where they are the natural products of the earth and not annual productions raised by *manurance* and the industry of man, they are parcel of the land and not chattels, as growing trees, fruit, or grass. Trees and bushes, when planted by a tenant who is a nursery man for the purpose of transplanting, are regarded as personalty.[2]

Wood and timber, cut and corded and separated from the land when sold, is a chattel.[3]

Apples and peaches are *fructus industriales*, being the result of periodical planting.[4]

§ 8. **Choses in Action and Possession.**—The terms goods and effects include *choses* in action as well as *choses* in possession. *Choses* in possession are personal things, of which one has possession; a *chose* in action is a thing which a person has not possession or actual enjoyment of, but only a right to, or a right to demand by an action. It is a personal right to a thing, not reduced to

1 Whipple v. Foot, 2 Johns. 418; Jones v. Flint, 10 A. & E. 753; Peacock v. Purvis, 2 B. & B. 362; Hartwell v. Bissel, 17 Johns. 128; Dunn v. Ferguson, 1 Hayes (Irish.) 542; Carrington v. Roots, 2 M. & W. 248; Sainsbury v. Mathews, 4 M. & W. 343; Randall v. Ramer, 2 Johns. 421; Mumford v. Whitney, 15 Wend. 387; Austin v. Sawyer, 9 Cow. 39; Warwick v. Bruce, 2 M. & S. 205: Graves v. Weld, 5. B. & A. 105; Evans v. Roberts, 5. B. & C. 529; Cutler v. Pope, 13 Me. 337; Stewart v. Doughty, 9 Johns. 108; Forbes v. Shattuck, 22 Barb. 568; Evans v. Ingleheart, 6 G. & J. 188; Adams v. Tanner, 5 Ala. 740; Westbrook v. Eager, 16 N. J. L., 81.

2 Penton v. Robart, 2 East, 88; Wyndham v. Way, 4 Taunt. 316; Miller v. Baker, 1 Met. 27; Whitmarsh v. Walker, 1 Met. 313.

3 Woodruff v. Roberts. 4 La. 127; Couch v. Smith, 1 Md. Ch. 401.

4 Purner v. Piercy, 40 Md. 212.

possession, but recoverable in an action, as a right to recover money due on a contract, or damages for an injury, which cannot be enforced against a reluctant party without suit. Promissory notes, coupons, notes for the payment of interest on bonds, judgments, etc.; accounts, account books, private papers or claims and demands against others; stock in corporations, bank shares, the interest of a special partner in a partnership; shares in a public Library; property let to hire as against the owner, during the time the property is in the use and possession of the lessee; the residuary interest of a debtor in goods assigned in good faith by him in trust for the payment of debts, or other specific purposes; contracts for railway shares; a lottery ticket, a claim against a railroad company for the value of goods destroyed by fire; debts due, negotiable bills and notes; the estate of a mortgage, before foreclosure, shares of stock, are included in the term goods.[1]

§ 9. **Fixtures.**—Chattels, whether real or personal, are considered as personal property in every respect. There are some chattels which, while being in the nature of movable property, yet are so annexed and necessarily attached to the freehold that they go along with it in the same path of alienation. Such chattels or things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become fixtures and pass with the land or remain chattels, according to the circumstances. Fixtures are chattels or articles of a personal nature, which have been affixed to the land. They must be permanently and habitually attached to it or must be component parts, of some erection, or structure, or machine attached to the freehold, without which the erection, structure, or machine would be imperfect and

[1] Ayres v. French. 41 Conn. 142.

incomplete. A personal chattel becomes a fixture, so as to form part of the real estate, when it is so affixed to the freehold as to be incapable of severance without injury thereto; and this, whether the annexation be for use, for ornament, or from mere caprice. Its true criterion is the united application of these requisites: 1st, actual annexation to the realty, or something appurtenent thereto; 2d, application to the use or purpose to which that part of the realty with which it is connected is appropriated; 3d, the intention of the party making the annexation to make permanent accession to the freehold. In order to take them out of the general rule which makes them the property of the owner of the soil, it is necessary to bring them within some of the established exceptions; or as determined by reference to the chattel itself, the position of the party placing it where found, as tenant or owner, the probable intention of placing it there, the injury that would result from its removal, and the object of the party in placing it on the premises, with reference to trade, agriculture, or ornament.[1]

In order to make a thing part of the realty by merely annexing it, it is necessary that the party annexing the thing, owns both the thing and the soil to which it is attached. A fixture cannot exist without actual annexation. A statue or thing which, by its own weight, is as firmly attached as though it had been fastened with cement or other material, is a part of the freehold. An articlemay be a fixture or a chattel personal, according to the agreement of the parties in relation to it; and the same protection is extended to fixtures for agricultural purposes as is afforded fixtures erected for purposes of trade. In the many adjudicated cases relating to questions as to what personal property were fixtures so as to become part of

1 Herman on Executions, pp. 161 *et. seq.* and cases there cited.

the freehold, are the following: Brick which have been put into a building by a contractor, when the owner of the property refuses to accept the work, employs mechanics to undo the work of such former contractor, and takes the brick down to the foundation, and piles them upon the land. The brick are part of the realty, and cannot be taken as the property of such former contractor. A portable grist-mill. A cotton gin attached to a building by nails and braces. A steam-engine and apparatus placed on the premises by the owner of the realty. Mill chains, dogs and bars of a saw-mill, being in their appropriate place. A marine railway. A clapboard machine and shingle machine attached to a saw-mill. Mill machinery detached from the mill for repairs. Engines and boiler of a steam saw-mill. A steam-engine, boilers, and machinery adapted to be moved by such engine by means of connecting bands and gearing, placed in a building designed for the purpose of manufacturing steam engines and other heavy iron-work. The rolls of an iron-mill, iron plates covering the floor, indispensable parts of the floor. Saws in a mill, where there are two sets, one may be at work while the other is being sharpened. So of a coffer which has two covers. The stones and irons of a grist-mill accidentally detached by a flood carrying away the main body of the mill. Potash kettles set in an arch of masonry, with a chimney through the arches, placed on a platform, and fastened to the building. A still set in brick-work in a distillery; pumps, cisterns, iron gratings, distillery, and horse mills. An iron safe encased in a brick wall. A portable hot-air furnace for the purpose of warming a house, set in a pit prepared for it, and the smoke-pipe leading from it to the chimney. Stoves standing in their places. Hop-poles used on a farm, though taken down to gather the hops in the yard, with the in-

tent of using them again in the proper season. Growing grass and fruit trees. A strawberry bed in full bearing, though purchased from the tenant. A border of box not grown for sale by the gardener. Manure in the ordinary course of accumulation on the farm, whether made by the owner of the land or the tenant, whether in heaps or scattered about the farm. Permanent fences when erected.[1]

§ 10. **Moveable Fixtures.** — The ancient rules of law by which the questions were determined, in regard to things annexed to the freehold becoming part of it, have been gradually relaxed and given way to a more liberal construction by courts, in favor of creditors and tenants. A tenant has the right to remove and carry away all such fixtures of a chattel nature as he himself has erected upon the premises occupied by him as such tenant for the purpose of ornament, domestic convenience, or to carry on trade, provided they can be removed without material injury to the land. Movable fixtures are so completely considered the personal property of the tenant that, when not exempt, they may be stripped from the house and sold on process against him as goods and chattels. They are goods and chattels because they are removable by the tenant: whenever a tenant is entitled to remove fixtures from the freehold, such fixtures are personal property or chattels. The rule, in regard to ascertaining whether personal property affixed to the freehold is to be regarded as, and retain its character as a chattel, requires that the article is capable of being removed without destroying or seriously injuring the freehold; that is, the premises must be in as good condition after removal as they were before annexation. To give more than the adjudications upon a question as intricate as that of the law relating to fix-

1 Herman on Executions p.p. 163, 164 and cases there cited.

tures is beyond the scope of a work of this character; therefore, the articles specifically adjudicated to be movable fixtures can alone be given. Among such are houses and buildings. Though it is a general principle of law that a building permanently fixed in the freehold becomes a part of it, and is realty, yet, if it is erected by the builder with his own money, or by a tenant for the purpose of trade, manufacture, or agricultural purposes, and for his exclusive use, as disconnected from the use of the land, and with an understanding to that effect between the owner of the land and the builder, it will be regarded as personal estate. A wooden dwelling-house, with a cellar of stone or brick, erected by the tenant for the purpose of carrying on the business of a dairyman, and the residence of those engaged in the business. A wooden ice-house, of two thousand tons capacity, on no foundation except wooden blocks, on leased land. A barn fixed on pattens. Barns placed upon blocks of wood lying on the ground, but not let into it. Buildings known as Dutch barns standing on a foundation of brick-work. A varnish house for carrying on a varnish manufactory, on a brick foundation, with a chimney. A ball-room erected by a tenant of an inn, resting upon stone posts slightly imbedded in the soil, removable without injury to the freehold. Bowling alleys in a room leased for ball purposes. A saw-mill on the land of another; or if constructed with the object and purpose of removal to another locality, after sawing the timber within a convenient distance. A bark mill. Cider mill and press. A post wind-mill; coffee-mills. Such vessels and utensils of trade, as furnaces, fixed vats, salt-pans, tables, partitions, buckets, pickets, faucets, small potash kettles, a heater in a tannery, bakers' ovens, carding-machines, copper stills, a stove for grinding bark affixed to a bark mill. Salt kettles, mortgaged

before they are embedded in brick arches. Pattern tools and movable fixtures, when agreed not to be included in a mortgage, but to remain unencumbered personal property. Agricultural fixtures. Green-houses, hot-houses, and all trees, shrubbery, etc., when planted by gardeners and nursery-men; but is not applicable to farmers. Gas fixtures, chandeliers, side brackets, etc. Stoves, grates, coppers, tubs, blinds, furnaces, cupboards, shelves, bells, bell-pulls. Wainscots, pier and chimney glasses, iron ores, iron safes, jacks, lamps, pumps, ranges, wall sinks, clock-cases, coffee-mills, looking-glasses, pictures, cabinets, desks, drawers, frames, etc. Ornamental cornice. Pumps. The moving scenery and flying stages in a theatre. Hewed timbers, posts, and round logs; stone, brick, and lumber, lying loosely on the land, not intended to be put into a building upon the land. A post and rail fence, when under an agreement to be removed. Turpentine, sugar maple. Peat, cut for fuel, lying on the land. Manure in a stable; in New Jersey, when on a farm. So are fixtures removed from the freehold to which they have been annexed by the owner. Counters—one called an oyster and trench counter, ten or twelve feet long and two or three feet wide, brought into the room entire and nailed to the floor, and afterwards enlarged by an addition of about the same size, constructed of joints and a base-board, both nailed to the floor, and of boards nailed to the joists and to each other; the other, called a bar, twenty-two feet long and two feet wide, brought into the room entire, and fastened to the floor by nails and with iron knees—are trade fixtures. Bridge piers, built and imbedded by a railroad company, are removable as personal property. Machinery erected by a tenant to carry on his business,—trade fixtures; machinery, when not attached, in breweries, collieries, mills,—as steam-engines and the like.

Steam boilers used in a saw-mill on a plantation, as between the lessor of the boilers and purchaser of the plantation. A steam-engine and boilers used as auxiliary to water-power, in a building by itself, with a smoke-stack one hundred feet high. An engine placed in a mill by a mortgagee in possession. A hydraulic press, if owned by a tenant. Machinery attached to a sugar-house, if detached; or if removed therefrom, are personalty. Or machinery and the like, which may be used in any other building, as well as that in which they are placed, though firmly secured to the freehold, if they can be removed without material injury to it.[1]

§ 11. **Rolling Stock of a Railroad Company.**—The question as to whether this class of property is personal or a fixture, so as to pass with the real estate and the road-bed, is a question of considerable importance, even at this late day, in the history of railway corporations. The adjudications upon this question are by no means uniform,—four adjudications by able jurists, in the State of New York, having failed to settle the question, until the case in the 52d New York court of appeals was decided. The arguments *pro* and *con* as to whether this species of property is a fixture, so as to pass with real estate or personal property, and governed by the laws relating to the disposal of personalty, are able and ingenious. The cases wherein these questions chiefly and principally arise, are those resulting from a race between ordinary creditors and mortgagees or trustees. As a general rule, many conflicting questions must be determined by the contents of the mortgage in determining what passes with it, as there may be a mortgage of the road-bed and iron, without the rolling stock. There is no principle of law, which pre-

[1] Herman on Ex., pp. 165 to 171, and cases there cited.

vents real and personal property from being encumbered by one conveyance—the question being not one of form, but of effect. The cases wherein these questions are involved are far from numerous, and that there has been any definite or satisfactory result, is somewhat doubtful. There are two cases, in the earlier Illinois Reports, which at the time settled the question, as far as that State was concerned, in which it was held to be a part of the realty. The reasoning of the court in arriving at its conclusion proceeded upon a theory seemingly plausible. In order to obviate the law as settled by these cases, the people of that State, in their late Constitutional Convention, adopted and subsequently ratified the following, as part of their organic law (§ 10, Art. 11): "The rolling stock and all other movable property belonging to any railroad corporation in this State, shall be considered personal property."

As we are now considering what may be deemed personal property, in order to ascertain the species of property which will pass and be included in the term chattel, the question as to the character of rolling stock will now be considered. In considering this matter, the question as to whether after-acquired property of this kind is covered by an ordinary mortgage, will not be here discussed, as it is fully treated of in the chapter pertaining to property covered by mortgage. Outside of statutory regulation in regard to its character, the question as to whether it is a fixture or personal property, is still an open one, with a large preponderance of authority in favor of its being personal property. The cases in which this question was first raised, were decided nearly twenty years since, during the early history of railroad corporations; in which it was held, that the rolling stock, such as locomotives and cars, is accessory to the real estate, and passed by deed as a fixture and necessary incident. The

reasons upon which the earlier cases were decided were: "That railway cars are a necessary part of the establishment, without which it would be inoperative and valueless. Their wheels are fitted to the rails; and except in cases of accidents, or when taken off for repairs, are nowhere else: they are not moved off the land of the company. They are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose. They are not like farming utensils, and possibly the machinery in factories and many of the movable appliances to stores and dwellings, the object of general trade: they are permanently used on the particular road where they are employed, and are seldom if ever changed to any other." That this theory was plausible, and peculiarly applicable at the time the questions were raised, cannot be doubted. The property of a railroad company consists mainly of the road-bed, the rails upon it, the depot erections, the rolling stock, and the franchise to hold and use them. When a corporation of this kind acquires an interest in land for the construction of its road, in that construction it affixes to the land certain things,—the ties and the iron for the track, the stone and timber for bridges and culverts. It also erects depots, and structures for a supply of water. The road is not considered as constructed and ready for use until such things are affixed. The road-bed, the rails fastened to it and the buildings at the depots and for water, are clearly real property, and would pass by any deed of land. But the question as to whether rolling stock is so permanently and inseparably connected with the more substantial realty as to become a fixture, is of no mean importance or difficulty. Railways being of modern invention, and of a novel character, there were no decisions upon this question prior to 1857, and there have been comparatively few since.

The decisions relating to and governing the law of fixtures cannot absolutely control a question of this kind. When railroads were incorporated under special charter, their powers carefully guarded and their privileges reluctantly granted, their lines were confined to particular localities, and seldom extended beyond the jurisdiction of the State wherein they were organized. The building of railroads and leasing them for nine hundred and ninety-nine years had not then been originated; and it became quite a popular theory, and, in fact, one of the impossibilities, to make a railroad either valuable or complete unless it was well supplied with rolling stock. The developments and changes made by the American railway managers have exploded these fallacies; and the reasoning of the courts, in arriving at their conclusions upon the theory, that the rolling stock is necessary to make the railroad complete, has but little application—in fact, no more than if it were to be determined that as a farm could not be cultivated without farming utensils and the necessary implements for husbandry, that as they were essentially necessary to make the farm productive and useful, that the plows, harrows, drays, etc., became part of the realty and passed with the farm under a real estate mortgage; or that household furniture passed with the sale of a house and lot, because the house would be of no value or income to the owner, unless it was used as a dwelling and supplied with the necessary housekeeping utensils, etc.

The theory that no railroad can be complete without machinery, has no application to the decision of this question. A railroad is complete and ready for operating as soon as its road is constructed and its depot buildings and structures for supplying water are erected. But, when the road is thus constructed and ready for use,

other things are required for that use—locomotives, cars and other articles and materials some of which are consumed in their use, and the supply has to be from time to time renewed. And there is a great distinction between the road as constructed for use, and the various things employed in that use. Can the things employed in the use of a road be considered as part of it, and of the real estate, or is it to be regarded as personal property. It must be personal property. Another answer to the theory is, that there are many, in fact a majority of the railway corporations of this country and in others that are not only complete, but are sources of immense revenue to the lessees, who do not own nor construct the road, and to corporations constructing the road who neither use or ever purchased any rolling stock for its use. Some of the cases rely on and extensively cite numerous and peculiar cases, wherein the law applicable to fixtures has been applied, and claim that the rolling stock must be a fixture because they can find nothing like it, in any of the books. In regard to this species of property, there are two important matters to be taken into consideration. The first is, that the common-law doctrines as applied by courts determining what are, and what are not, fixtures, have no more application to this species of property than they would have to balloons. The common-law rule, in regard to fixtures, has been adhered to and applied by courts for centuries. It has been applied in almost every conceivable case where the question of annexation to the freehold could be imagined. But I have yet to read, or be cited, to the first case where it is applied to a stage or mail coach on a post-route, or boat used as ferry. That there were post-routes on turnpikes which cost vast sums of money to construct and operate, there can be no doubt. That such turnpikes were incomplete without the neces-

sary means for the transportation of freight and passengers, has never been asserted; for they might have been leased as readily as our railroads are in the present age, so that the question of completeness affords no criterion. Another matter—the development of the immense system of railways in the greater portion of the civilized world, is a matter of recent growth—is the creation of a species of property unknown to the common-law; and, therefore, the common-law doctrines are inapplicable to this species of property. Mortgages of the franchises, real property and appurtenances of such corporations, were also unknown; and, therefore, the common-law doctrines would not apply in construing what would pass by the term appurtenances. As applied to real estate at common-law, it means one thing; as applied to a railroad corporation, something entirely different, or antagonistic in its meaning. That the common-law rules of construction as to fixtures are inapplicable to this species of property, cannot be doubted. Where, then, are we to ascertain what principle of law is applicable? Shall it be said that, because it is the creation and invention of modern times, and unknown at common-law, it is to be treated as *sui generis*,—governed by principles applicable solely to its use in connection with its ownership,—or by its use in connection with its situation or location.

The later decisions in regard to the questions of fixtures, and the statutory innovations and changes, have enlarged the principles relating thereto; and, while an ordinary steam-engine is personal property in the manufactory, it becomes a portion of the real estate and a fixture when purchased and set up in the mill of the owner, if annexed to the freehold. In determining whether annexed so as to become a fixture, reference must be had to the nature of the chattel; the position of the party placing

it where found; the probable intention of putting it there; the injury that would result from its removal, and the object of the party placing it on the premises. Can this doctrine be applied to this species of property? If not, why not? For the reason that no such questions can arise. A railroad car is not annexed to the soil; it is not stationary; if it were, it would be useless. The position of the party, whether tenant or mortgagor, cuts no figure in the case; nor the intention of the parties. It is placed upon the track, or road-bed, just as a plow or harrow on a farm, or a ferry-boat is on a river, to make the franchise profitable to its owners, and carry all the passengers and freight that are offered. It need not be of peculiar construction. It is true that it is peculiarly adapted to railroads, but not to one railroad only. It may be adapted to every railroad in the United States; and may be used on twenty different roads, and may not be on the line of the company owning it from the time of its purchase or construction more than a week, or a day, as the case may be. How, then, can the question of annexation, intention, or use, cut any figure? It may be used, after once off the line of its road, by other companies, who have no claim or title to it, in the same manner as it is by its owner; still, it is neither removed nor severed from the soil. It passes through numerous jurisdictions, and different States. Can it be fixture on the real estate, or a portion of such real estate, belonging to the corporation which purchased it under such circumstances? If so, where is the similarity in the application of the principles? These questions, at the time of the rendition of the adjudications referred to, would be regarded as absurd as the proposition to build a railroad would have been in Lord Coke's time. Not only has the railroad been built, but the very

questions herein discussed have arisen, and been adjudicated in various modes; some of which regard this species of property as a fixture, and, therefore, passing with real estate as an appurtenance—others as chattels personal, incapable of being annexed to the freehold in such a manner as to pass with it, but governed by the rules of law applicable to personal property; still others, that it is *sui generis*;—a fixture when on the line of its own road; personal property when beyond it; personal property as regards taxation; real estate as regards mortgagor and mortgagee. That it is personal property, is too plausible to doubt. For, while it may be an important and essential element in the operation of a railroad, it is not such an essential part that its removal will destroy or impair the property; while it is true that it is fitted to the tracks, and held down and fastened thereto by its own weight, it is by no means stationary or so annexed as to become part of it. It may be removed without injury; it may be used on roads thousands of miles from where it is owned, without injury to the real property of the company. Suppose, for instance, that the rolling stock of a railroad in Massachusetts should be considered and regarded as a fixture, subject to a mortgage as real estate; that rolling stock in the course of traffic is used in such a manner that it is transferred from Massachusetts by the same gauge of roads to California, or some distant State; a creditor recovers judgment against such railroad company in California—would it be held that such rolling stock was a fixture, a part of the railroad in Massachusetts, and was subject to a mortgage there, and could only be sold as real estate, and subject to the lien of such mortgage, and governed by the laws of Massachusetts applicable to final process on land, no matter where it is located? Or, would

the law of the place where such rolling stock may be located govern its sale? Under the present system of railroads the rolling stock is as well adapted to one road as another; it is a matter of almost constant bargain and sale between various corporations. One company may sell its rolling stock to another, and replace it by a new and more improved kind, and it is as applicable upon one road as the other; while it may be an essential element in the operation and beneficial results of a franchise, a corporation may receive the same revenues, and its franchise may be just as valuable if leased and operated by some foreign corporation which owns the rolling stock in use. Therefore, it cannot be an essential part of the realty. Upon the same principle applied in the determination that it is a fixture so as to pass with the land, a ferry-boat or stage coach may be a fixture; so as to pass with a sale of ferry landings, or a turnpike company, and if a mortgage is made of either, and registered as a conveyance of real property, a creditor would have notice that the coach and boat were included. It is no more in the nature of a fixture than a plough or any farming utensil. They are essential elements in the beneficial operations of a farm. They require to be used in order to make it productive. So does rolling stock. They are just as essential to every farm in the country, as they are to one. They are in as general use as rolling stock is on a railroad; and is there any question as to their being personal property?

There are many railway companies in the United States, who have constructed and completed their road (that is, supplied it with iron and laid the track, erected depot buildings, etc.), and so encumbered it with mortgages, and impoverished the corporation as to be without the means or credit to afford a suitable supply of rolling

stock. Or, if partially supplied, the necessities of trade and commerce may require large additions in order to meet its demands—many companies being unable to purchase the rolling stock actually necessary for the beneficial operation of their road. Corporations have been, and are constantly being, organized for the purpose of supplying such necessities, by leasing rolling stock to such companies. They are known as railway equipment companies, and are entirely distinct from railway corporations, as they neither own, construct, nor operate railroads. A railway being compelled to obtain more rolling stock, makes an arrangement with one of these equipment companies for a supply. When ready, the *railway company* obtains it, and places it upon its road: it is admitted that it is necessary in the use and operation of the road, and that it is placed there by the owner of the road, not the lessee. Under this statement of facts, to apply the principles of law as established in England and this country, in regard to fixtures, and claim, that it becomes a part of, and accessory to, the road-bed (which is real estate upon principles too well established to be questioned) is giving the law so wide an application as to make a burlesque of it. Nor can the principles governing tenants' fixtures be applied, for the tenant in this case is the owner of the fee; and as soon as the rolling stock reaches the road, it becomes part of it. If the lessor attempts to retake his property, the mortgagee may ask a court to prevent this by injunction as impairing his security. So that, view the matter in any light possible, rolling stock can not be regarded as a fixture; and for these reasons the conclusion arrived at is, that rolling stock of a railway company, like furniture in a house, a ferry-boat on a river, or a stage on a post-route, must be considered as falling within that class of property which is known as personal

or chattel, and this view is sustained by numerous decisions.[1]

§ 12. Under the feudal system, real property was the great source of political power, and the foundation of feudal grandeur. Chattels were rarely an object of notice, either in the treatises or reports of the times prior to the reign of Henry the Sixth. They continued in a state of insignificance until the decline of feudal tenures; and the increase of industry, wealth and refinement had rendered them an object of growing solicitude. Real property, however, lost none of its value as an element of individual and national wealth, but on the contrary, it greatly advanced in value. Still, chattels personal have obtained a paramount place in our jurisprudence, by reason of their varied and interminable number, and by reason of the natural necessities which civilization developed and of the artificial necessities which it created. The ancient law books contain but little in regard to this species of property, and nothing in regard to mortgages of it. The rules by which this class of conveyances are governed are, to a great extent, derived from the doctrines of Real property, from Reason and convenience.

§ 13. **Mortgage.**—Having now ascertained the nature of a chattel, and the species of property which is comprised under the term chattel, we must now in regular order proceed to ascertain what a mortgage is, and

[1] Dubuque v. Ill. Cent. R.R., 39 Iowa, 56; Hoyle v. P. & M. R.R., 54 N.Y. 314; Randall v. Elwell, 52 N. Y. 522; Hill v. La Crosse R. R., 11 Wis. 214; Coe v. R. R. Co., 10 Ohio S. 372; B. & C. R. R v. Gilmore, 37 N.H. 410; Pierce v. Emery, 32 N. H. 484; Minn. v. St. Paul, 2 Wall. 609. Stevens v. B. & C. R. R., 31 Barb. 591; Beardsley v. Ontario Bank, Id. 619; Howe v. Freeman, 14 Gray, 566; Pacific R. R. v. Cass Co., 53 Mo. 17.

the nature thereof, in order to understand the nature of a chattel mortgage. The word mortgage is derived from the two French words *mort* (that is, *mortuum*), and *gage* (that is, *vadium*, or *pignus*), and it is called in Latin *mortuum*, *vadium* or *morgagium*.[1]

A mortgage is always a dead pledge; that is, literally the meaning of the words *mort* and *gage*, or "*vadium*," is synonymous with pledge. In ancient times, if a conveyance by way of *pledge* or *gage* was made, it was upon the condition that, if the pledgor would pay to the pledgee, at a certain day a certain sum, then the property pledged was released and dead to the pledgee or mortgagee: it was, *mortuum vadium*, because it was a matter of doubt whether the mortgagor would pay at the day limited in the conveyance; and at common law, if he did not pay, then the property that was put in pledge was taken from the mortgagor for ever, and so dead to him; if he did pay it was retained by the mortgagor, and was dead to the mortgagee. Under the ancient system, mortgages were actually forfeited at the day of payment, and the mortgagor had no remedy to recover his property. In ancient times, things were lent sometimes *sub vadii positione;* and then either movables, as chattels or immovables, as lands and tenements, were given in pledge. A pledge was either given at the time of lending, or not. It was sometimes given for a fixed term, sometimes in *mortuo vadio*, and sometimes not; *mortuum vadium*, or mortgage, was when the fruits or rents arising therefrom did not go towards paying off the demand for which it was pledged.

§ 14. **Origin and nature of mortgages.**—Mortgages have been traced by legal writers to the earliest nations, and are by some thought to have originated with

[1] Co. Litt. 205 A.

the Jewish nation, and transmitted by them to the Greeks and Romans. But mortgaging, as practiced in modern times, seems to owe its introduction to the civil law, which distinguishes between things pledged or hypothecated and things mortgaged. In the following passage, we have a description of a mortgage of movables or chattels. H. *Si a te comparavit is, cujus meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res, inempta remitti hanc, conventionem rescriptio nostro non jure petis. Sed si se subtrahat, ut jure dominii eandem rem retineat; Denunciationis et obsignationis depositionisque remedio contra fraudem potes jure tuo consulere.*"[1]

In a state of nature, agreements of this kind must have been entirely useless; for, in that state, a creditor might have seized on any part of his debtor's goods without ceremony or contract.[2]

But when society became compacted and consolidated, there immediately arose a right to every man to enjoy his own, and the support and vindication of that right was one grand object of every civilized community. Among subjects of the same State, it must soon have suggested itself, that no easier method of supplying their immediate wants, could have been adopted than by resorting to a system of borrowing on loan. When men recognize the rights of property, their necessities will suggest the idea of pledging that property as the ready means of supplying their wants without departing with their absolute ownership. Their immediate personal property may be the first objects of pledge, afterwards articles of merchandize and trade, and finally land. They must frequently have been in need of temporary accommodation, and the plan of assisting each other on credit would have exhibited the readiest method of giving re-

[1] Code 24, t. 54, § 7. [2] Puff. L. 5, c. 10, § 16.

lief to their present necessities. In cases of magnitude, they would have required a pledge, or security for the return of the thing borrowed, and the immediate delivery of some movable article was the consequence of a compliance with that request. Hence, it should appear that the primitive idea of mortgaging ought to be referred more to the introduction of order and civilization among mankind, than to the invention of any particular set of people; for the tranquillity of every commonwealth (depending, so greatly as it does, on mutual assistance), it is absolutely requisite that recourse should be had, even in its infancy, to this system of lending on security. It is evident that different nations would subject it to different regulations. In England, the Court of Chancery, adopting the civil law doctrine, has given rise to the inseparable incident of redemption and foreclosure, which has been followed in the various American States. But the general principle must have been common to all mankind as a necessary effect of the establishment of society. The practice, then, of lending and borrowing must have existed from earliest antiquity. For, in the Laws of Moses, Deuteronomy, chapter twenty-four, we find the first regulations in regard to pledges. Its present prevalence, which is almost universal, may be attributed to the extension of commerce; for commerce could not be carried on without credit, and credit could not be obtained without compensation. The present system of mortgaging having come more immediately from the civil law, it becomes necessary to consider the distinction in that law between pledges and things hypothecated.

The pignus, or pledge, was when anything was obliged for money lent and the possession passed to the creditor.

The hypotheca was when the thing was obliged for money lent, and the possession remained in the debtor.

As stated by Justinian: "*Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit; ut eam quæ sine traditione nudâ conventione tenetur, proprie hypothecæ appellatione continerit dicimus.*" In case of goods pignorated, the creditor was obliged to the same diligence in keeping them as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep it as his own. If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *action pignoritia* or *hypothecaria;* which, when he had pursued and obtained sentence thereon, he might sell the thing pledged as his own property; but there was this difference between the *actio pignoritia* and *hypothecaria:* The *pignoritia* was only against the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem quam in personam*, and was given *ad pignus prosequendum, contra quemcunque, possessorum;* because herein the creditor had not possession of the pledge, but it remained to the debtor, and until judgment was obtained in these actions, the creditor could not obtain the property of the pledge, and if the money was paid before judgment, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore*, to whom the things were first hypothecated. If the money was tendered or paid to the creditor, the contract of *pignoration* was dissolved, and the debtor might have the pledge back, as a thing lent, which seems to have been the origin of the mortgagor's right to redemption, and

with them the usucaption, or right of prescription, did not extinguish the pledge, unless a stranger had held it thirty years or the debtor forty years.

A pledge or mortgage of land, in Glanville's time, was given as security for a debt, and no gage or pledge was good unless possession was also delivered to the creditor. "*Si non sequator ipsius vadii traditio, curia domini regis hujus modi privatas conventiones tueri non solet,*" for which the reason given is to prevent fraudulent and subsequent pledges of the same property: "*Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari.*" The pledgee or mortgagee who failed to obtain possession of the property, was deemed guilty of negligence; and if the pledgor made a subsequent pledge of the same property to another, the prior mortgagee was entirely remediless, and could obtain no relief from the courts. From this obtained the doctrine, since relaxed, that delivery of possession was necessary to the validity of a mortgage. The mortgagee being thus compelled to take possession of the property in order to protect his security, held the property until breach of condition or forfeiture, then the title vested in him absolutely, courts of law affording the mortgagor no relief. This species of conveyance being attended with great hardship and many inconveniences, another sort of mortgage was adopted, mortgages for a term of years with a condition to be void upon payment of the mortgage-money. But courts of equity, after their jurisdiction became firmly established, placed mortgages upon a just footing by applying the doctrines of the civil law to this species of conveyances, maintaining the power of redemption as an equitable right, and binding all persons. The principle upon which they proceeded was, that the payment of the money, in the consideration of equity,

placed the mortgagor in *statu quo*, as the property was originally only a pledge for the money lent. After the establishment of the right or power of redemption, mortgages in the usual form were again adopted; from which has arisen the term equity of redemption, which is the interest of a mortgagor in property thus encumbered before foreclosure. Redemption is an equitable process, by which a mortgagor, or other person interested in personal or real property subject to a mortgage or encumbrance, may recover the absolute ownership thereof, upon certain terms, which are usually the payment of the principal amount due, with interest thereon, and the costs of the mortgagee.

Foreclosure is (as to redemption) the converse, and generally the reciprocal remedy,[1] whereby the mortgagee, or other person entitled to the benefit of a mortgage or incumbrance, may acquire an absolute title to the encumbered property upon non-payment, by the person entitled to redeem, of the amount secured thereon with interest and costs; wherever there is a right to foreclose, there must of necessity be a right to redeem, because foreclosure is in default of redemption.

The existence of a right of redemption does not necessarily depend upon any distinct agreement, but may be inferred from the nature of the transaction. It arises where property, or the evidence of property, has been transferred as security for the payment of money, or has come to the hands of a person subject to a condition and to the like effect; and where the nature of the transaction is doubtful, the intention of the parties may be shown by extrinsic evidence, or may be ascertained by a jury.[2]

[1] Lonquet v. Scawen, 1 Ves. 453; King v. Meighen, 20 Minn. 264.

[2] Post, chapter 2.

The simplest form of redeemable contract is the common legal mortgage, as a pledge or security for the debt; the conveyance being absolute in form, but subject to a proviso, by which it is to become void, or by which in the pledge is to be reconveyed, upon repayment to the grantee of the principal sum secured with interest on a certain day; which is usually fixed at the end of one year, or less, from the date of the security. Upon the non-performance of this condition, the mortgagee's estate becomes absolute at law, but remains redeemable in equity during a limited period.

§ 15. **Various Legal Definitions of a Mortgage.**— Having attempted to trace the origin of mortgages, we will now ascertain the construction and definitions given by courts to this species of conveyance. A mortgage is an instrument in writing, executed by one party who is termed the mortgagor to another party, who is termed the mortgagee. "A mortgage may be defined to be debt by specialty, secured by a pledge of property, real or personal, of which the legal ownership is vested in the creditor, but of which in equity the debtor, and those claiming under him, remain the actual owners, until debarred by judicial sentence, by legislative enactment, or by their own laches." "It is a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the civil law.[1] Another definition is, "that it is a conditional conveyance, designed as a security for the payment of money, the fulfilment of some contract, or the performance of some act, and to be void upon such payment, fulfilment, or performance.[2] "It is an alienation, but only *protanto*."[3] "It is not a con-

[1] Coote, Mort.

[2] Mitchell v. Burnham, 44 Me. 286.

[3] Lafarge Ins. Co. v. Bell, 22 Barb. 54.

veyance in trust, but an incumbrance created to pay a debt; it is neither an assignment, conveyance, or transfer[1]; it is only security for the payment of a debt or performance of some act, the title remaining in the mortgagor until forfeiture or *default*.[2] The term mortgage has a technical significance in law; and when used in legal proceedings as descriptive of a written instrument, it must be taken and construed according to its technical and legal import.[3] There have been many adjudications wherein a definition of a chattel mortgage has been given. Among the many, the following have been selected as comprising the elements of such an instrument: "A chattel mortgage is pledge of property as security for the payment of a debt. It is the accident of the debt, and defeasible upon its payment at any time before foreclosure.[4] The debt is the principal, and the mortgage the incident[5]; it is not only a lien for the debt, but a transfer of the property itself as security for the debt,[6] defeasible by the performance of the condition according to its legal effect.[7]

It is a pledge, and something more; for it is an absolute pledge to become an absolute interest, if not redeemed in a certain time.[8]

Some of the courts have adopted as a definition that "a chattel mortgage is more than a mere security; it is a conditional sale of the thing mortgaged, and operates to transfer the title to the mortgagee, to be defeated only by a full performance of the condition. Nothing short of actual payment, in case of a breach of condition, before foreclosure and sale. or voluntary

[1] Seals v. Cashin 2 Ga. Dec. 76.
[2] Davenport v. Bartlett, 9 Ala. 179.
[3] Walton v. Cody, 1 Wis. 420.
[4] Briggs v. Fish, 2 Chip. 100.
[5] Jackson v. Willard, 4 Johns. 4.
[6] Conard v. At. Ins. Co., 1 Pet. 386.
[7] Erskine v. Townsend, 2 Mass. 495.
[8] Doak v. Bank, &c., 6 Ired. 309; Jones v. Smith, 2 Ves. J. 378.

waiver or surrender, can revest the legal title in the mortgagor.[1]

If the terms of redemption are not complied with, then at common law, the title becomes absolute in the mortgagee. The nature of the agreement must be such that, by mere non-performance of the condition by the mortgagor, the title will be transferred to the mortgagee by the force of the agreement.[2]

The distinction made by the civil law, between pledges and hypothecations, has not been observed by all courts, nor been constantly maintained as the only method of distinguishing between the two classes of security. The distinction, as laid down by text-writers and others, is that, in case of a pledge, the title remains in the pledgor, and the possession passes to the pledgee while, in the case of a chattel mortgage, the possession remains with the pledgor or mortgagor and the title passes to the mortgagee.[3]

Judge Story, in his work on Bailments, defines and thus distinguishes a mortgage of chattels from a mere pawn or pledge: By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the property is not

[1] Hill v. Beebe, 13 N. Y. 565; Butler v. Miller, 1 N. Y. 496; Bank v. Jones, 4 N. Y. 497; Heyland v. Badger, 35 Cal. 414; Wright v. Ross, 36 Cal. 414.

[2] Langdon v. Buel, 9 Wend. 86: Parshall v. Eggart, 52 Barb. 367; Huntington v. Mather, 2 Barb. 96; Brown v. Bement, 8 Johns. 96; Brownell v. Hawkins, 4 Barb. 491; Porter v. Pamley, 13 Abb. P. N. S. 104.

[3] Conner v. Carpenter, 28 Vt. 237; Sims v. Canfield, 2 Ala. 455; Eastman v. Avery, 23 Me. 248; Day v. Swift, 48 Me. 368; Cortelyou v. Lansing, 2 Carnes' Cas. 200; Gleason v. Drew, 9 Me. 82; Ward v. Sumner, 5 Pick. 60; Haven v. Low, 2 N. H. 13; Ash v. Savage, 5 N. H. 545; Barrow v. Paxton, 5 Johns. 258; Brown v. Bement, 8 Johns. 97; Lewis v. Stevenson, 2 Hall, 63; McLean v. Walker, 10 Johns. 471; Portland Bank v. Stubbs, 6 Mass. 425; Tucker v. Buffington, 15 Mass. 480; Borsee v. Amee, 8 Pick. 236; Holmes v. Crane, 2 Pick. 610; Fletcher v. Howard, 2 Aik. 15; Conrad v. Atlantic Ins. Co., 1 Pet. 449.

redeemed at the time stipulated in the conveyance, the title becomes absolute at law: although equity will interfere to compel redemption.[1]

Such are the various definitions of chattel mortgages, as given by courts and others; none of which, under the liberal views of various courts in regard to this species of conveyance, and the relaxation of the idea that it is a conditional sale vesting an absolute title in the mortgagee, and the rights of parties thereunder, exactly define the nature of a chattel mortgage. In tracing the origin of mortgages, we find that, under the civil law, there was a system established, of what we have termed an equity, or right of redemption. In England and at common law, no such thing was known. The mortgagee was compelled to take possession—if he did not, he was guilty of negligence; and if a sale or mortgage was subsequently made by the mortgagor, he was entirely remediless. To obviate the perpetration of such fraudulent transactions, the statutes of frauds and fraudulent conveyances were enacted, declaring void all such transactions without change or delivery of possession, thus making a mortgage not only a pledge but more than a pledge. (Vide *post* Book II. chap. 6.) Similar statutes were enacted in almost all the American States, with a far different effect; in some of the States, such transactions were regarded as fraudulent *per se*, in others as *prima facie* only; and *then* a series of

[1] Story on Bailments, § 287, p. 246; Parks v. Hall, 2 Pick. 206; Gordon v. Mass. &c. Ins. Co., 2 Pick. 249; Brown v. Bement, 8 Johns. 96; Ackley v. Finch, 7 Cow. 290; Hart v. Ten Eyck, 2 Johns. Ch. 100; Peters v. Ballistier, 3 Pick. 495; Langdon v. Buel, 9 Wend. 80; Patchin v. Pierce, 12 Wend. 61; Gifford v. Ford, 5 Vt., 532; Flanders v. Barstow, 18 Me. 357; McLean v. Walker; 10 Johns. 141; Jones v. Smith, 2 Ves. 378; Havens v. Low, 2 N. H. 13; Barrow v. Paxton, 5 Johns. 258; Garlick v. James, 12 Johns. 146; DeLisle v. Priestman, 1 Browne, 176.

adjudications, holding that where the retention of possession was not inconsistent with the instrument, it was a matter of fact to be ascertained by a jury. In order to obviate the disastrous effects which a change of possession would in many cases have resulted in, and to prevent a debtor from losing his property, and depriving him of perhaps the only resources he had to meet his liabilities, statutes were passed in the American States, as well as in England, known as the registration acts, whereby the same result, as to giving notice to creditors and others, was obtained as a change of possession would give—a strict compliance with the registration acts being regarded as equivalent to the actual change of possession. (Vide *post*, chap. 6.) That part of the statute of fraudulent conveyances which makes the validity depend upon delivery of possession, has been virtually done away with. The common-law courts of England, upon a failure by the mortgagor to perform the conditions of his agreement, were unable to afford the mortgagor any relief, although he might have been enabled to fulfil his agreements the day after the forfeiture or breach of condition; and they declared his title absolutely divested, and that the mortgagee, upon such breach, became the absolute owner of the mortgaged property. This being regarded as a species of gross injustice, equity was compelled to adopt some measure by which this injustice should be alleviated, and gave the mortgagor a right of redemption, declaring that mortgages were not absolute conveyances, but were securities for the debts therein set forth. The American courts adopted the common-law doctrine, that a mortgage vested the absolute legal title in the mortgagee, with no right of redemption after the time specified in the mortgage, and also the English doctrine, that a mortgagor had no interest liable to levy and sale, either on execution or

otherwise, as the legal title vested absolutely in the mortgagee. The courts in America then established and adopted the English equity doctrine, that a mortgage is a mere security,[1] in fact, no conveyance of title at all, and therefore, in such a transaction, that the title does not pass out of the mortgagor by the mere execution of the instrument, but that he still remains the owner, and that the mortgage is a mere security, enforceable either in equity or law by foreclosure and sale, in conformity with a judgment or decree; and under the reformed code practice, in accordance with its provisions and the mortgagor's title, was not divested until after a legal sale, made in conformity with a decree of court or a power given in the instrument itself, or by virtue of some statutory provision, which became a part of the contract. There is considerable confusion, in the old reports and text-books, in regard to chattel mortgages and pledges; some holding that a mortgage is equivalent to a pledge, others as an absolute conveyance of title, subject to defeasance by redemption, and others

1 Chick v. Willetts, 2 Kans. 384; Ladue v. Detroit R. R., 13 Mich. 380; Watkins v. Wright, 6 McLean, 340; Mussina v. Bartlett, 8 Port. 277; Simms v. Shannon, 19 Md. 296; Brown v. Chase, Walk. (Mich.) 43; Ruggles v. Williams, 1 Head, 141; Bludworth v. Lake, 33 Cal. 265; Phil. &c. R. R. Co. v. Johnson, 54 Penn. 127; U. S. v. Athens Armory, 35 Ga. 344; Jackson v. Lodge, 36 Cal. 28; Fletcher v. Holmes, 32 Ind. 497; Williams v. Beard, 1 S. C. 309; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hildebrand, 46 Mo. 284; Mark v. Wietzlar, 39 Cal. 247; Pease v. Pilot Knob Iron Co., 49 Mo. 124; Lucking v. Wesson, 25 Mich. 443; Van Brunt v. Walkalee, 11 Mich. 177; Gay v. Bidwell, 7 Mich. 519; Darrow v. Kelley, 1 Dall. 142; Anderson v. Neff, 11 S. & R. 208; Lockett v. Hill, 1 Wood, C. C. R. 552; Wilson v. Trump, 2 Cow. 196; Ryan v. Mersereau, 11 Johns. 534; Bennett v. Taylor, 5 Cal. 502; McMillan v. Richards, 9 Cal. 365; Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, 16 Cal. 559; Fogarty v. Sawyer, 17 Cal. 589; Dutton v. Warshauer, 21 Cal. 609; Davis v. Anderson, 1 Ga. 176; Ryland v. Justices, &c. 10 Ga. 65; E'lfe v. Cole, 26 Ga. 197; Seales v. Cashner, 2 Ga. Dec. 76; Hall v. Seville 3 Ia. 37; Caruthers v. Humphrey, 12 Mich. 270; Bryan v. Butts, 27 Barb. 503; Thayer v. Cramer 1 McCord Ch. 395.

as mixture of the two. Courts desiring to follow decisions applicable to the general principles have, in many cases, applied such decisions where the facts would not support their application; and the result has been, that many of the decisions have since been found inapplicable, and when applied have resulted in great injustice to the parties. So that it became necessary to enact statutes governing this species of conveyances, and to protect the rights of parties thereunder. In such statutory enactments, chattel mortgages have been placed as near as practicable, on the same footing with mortgages of real estate. This being the effect of such statutes, courts of law as well as equity are adopting the principles taken from the civil law in regard to mortgages of real estate, that of the right or equity of redemption in the mortgagor: thus making a chattel mortgage a mere security, an incident to the debt intended to be secured, leaving the ownership and possession in the mortgagor upon a strict and full compliance with the statutes; being a more just, equitable and humane view of the rights of the parties in executing this species of security.

§ 15. *a.* **What a Chattel Mortgage Is.**—While none of the many definitions seem to exactly define what a chattel mortgage is, and while it is mortgage of personal property, a general definition in view of the tendency of the more recent and better settled decisions is, that a chattel mortgage is an instrument in writing in the nature of an absolute conveyance, designed as a security for money, the fulfilment of some obligation, or the performance of some act, by which instrument the mortgagee acquires a specific and paramount lien upon certain personal property or chattels therein described, with a condition or provision for a, redemption

from, satisfaction or discharge of such lien and the release of such security, upon payment, or the performance by the mortgagor of some act therein mentioned; which lien, upon forfeiture or breach of condition, while it may ripen into an absolute title at law, gives the mortgagee an immediate right of possession for the purpose of satisfying his lien out of the mortgaged property; and such possession may be obtained peaceably or by the aid of a court of law, and the property be sold as provided by statute, the mortgage, or by the judgment of a court. It does not convey an absolute legal title to the property mortgaged, for the reason that the mortgagor may sell and convey it, subject to such lien; and all a purchaser or subsequent encumbrancer need do is to discharge the lien by complying with the provisions of the mortgage: so that, in this respect, there is no distinction betweeen mortgages of real and personal property prior to a forfeiture or breach of condition. A mortgage is but a *lien* upon real or personal property for the security of a *debt*. A mortgagee, after he obtains a mortgage, is still a creditor; the consideration for the mortgage is the debt; and it remains a debt until discharged or satisfied by payment or sale under the mortgage, or by legal process. The essence and object of a mortgage is, that it shall be a mere security for a debt, and it is no more than a lien on a particular subject for a debt. It was laid down by Lord Hardwicke that the person entitled to the equity of redemption is considered as the owner; and that doctrine has been universally sanctioned and approved from his time to the present. There can be no mortgage, unless there is an equity or right of redemption: it is this right which makes the transaction a mortgage; the very nature of the transaction compels and protects this right in the mortgagor. So that no title passes to the mortgagee when

his instrument is executed and recorded: it gives him the same, and no greater, rights than a mortgagee of real property has—the right, upon default or breach of condition, to subject the specific property described in the instrument to the satisfaction of his debt in the manner provided by statute, by the instrument itself or by due process of law. If the execution of the mortgage and the delivery of possession paid the debt, it would be a sale if possession is to be delivered, whether registered or not; it would be a pledge, and more than a pledge: it is, in fact, neither a sale nor a pledge; it is a lien regulated by statute, which is based upon the civil law rules, and the peculiar doctrines of equity which have been adopted as settled law.

§ 15. *b.* **Modification of the Doctrine regarding Possession.**—There is another distinction, which courts are inclined to make between chattel and real mortgages, as regards the rights of the parties thereto, as heretofore stated. The common-law and the statutes of frauds and fraudulent conveyances required a change of possession, in cases of sales and conveyances of personal property, as indicative of good faith. Prior to the registration acts, the subjects of sales and mortgages of chattels without delivery of possession, created more protracted discussion than any other matter, probably, in the law, and resulted in a great contrariety of decisions. Since the passage of the registration acts, the doctrine that registration is equivalent to delivery of possession, has met with almost universal approval by the courts; and the mortgagor is entitled to retain possession until breach of condition, whether so provided for or not in the conveyance; while another class of cases sustain a doctrine that, in the absence of such stipulation, the mortgagee is entitled to pos-

session, in accordance with the doctrines of the common-law. Whether there is any reason or theory for this assumption, is a matter of great doubt, and can only originate upon the ground that a mortgage of chattels is a mere pledge, between which these courts make no distinction; while, in many cases, the greater number of which are never heard of in courts of law, the mortgagor is permitted to retain possession until deprived thereof by forfeiture or breach of condition. The nature of the transaction itself, in contradistinction from that of a pledge, is conclusive in favor of the mortgagor's right of possession until forfeiture; were it otherwise, there would be no necessity for the execution and registration of a mortgage. If the intention of the parties were that the property should pass, in lieu of giving a lien thereon, their contract would be one of pledge at once, and their intention would be affected without the execution of any written instrument to show this. In fact, under the registration laws there can be reason for this doctrine. At common-law, mortgages were sometimes held valid, without change of possession. The necessity for change of possession has always been declared to be that of giving notice to creditors and others. This is the intention of the registry laws, and this is all that a mortgage is intended for as to third parties—an instrument of notice of the rights of the mortgagee in and to the property in case of default or breach of condition; until which time, he has neither an absolute title nor a right of possession, any more than he would have under a mortgage of real estate with the same rights and remedies in case of the impairment of his security that he would have in case of real estate. As these matters will receive full consideration in their appropriate place, we will dismiss the subject for the present.

§ 16. The statutory provisions of the various States of the Union are by no means uniform. The rights, remedies, and liabilities of parties to a chattel mortgage are somewhat varied. In so far as the State statutes control, no general principle inconsistent therewith can be given in order to harmonize what may be seemingly inconsistent or antagonistic adjudications; nor can the statute law of one State, relating to this species of security, be relied on or cited to explain or control the adjudication upon a statute of another State entirely dissimilar. It may, however, be stated that the rigid rules of constuction which have been applied to this class of mortgages, by various tribunals, are being constantly and gradually relaxed and modified. So that there will be such uniformity that the adjudications will closely assimilate to those governing mortgages of real property, so far as the rights, remedies, priorities and liabilities of the parties and also third persons are concerned.

§ 17. Having ascertained what a chattel is, and the origin and nature of mortgages and the various changes and modifications of the principles of law as applied by courts, we must now proceed, in proper order, to examine and treat of their form, the property mortgaged, and its description; the debt for which it is security, and how described and shown; their delivery and necessity thereof; their validity, as depending on change of possession or registration; the effect of sales by the mortgagor while in possession; the rights, remedies, and liabilities of parties —payment, discharge and satisfaction, etc., etc.; and the doctrines, as applied by courts, which are gradually assimilating mortgages of real and personal property.

## CHAPTER II.

### OF THE FORM OF A CHATTEL MORTGAGE.

WHAT CONSTITUTES A MORTGAGE.—ABSOLUTE DEEDS OR CONVEYANCES, WHEN REGARDED AS MORTGAGES.—VERBAL OR WRITTEN DEFEASANCES.—INTENTION OF THE PARTIES TO CONTROL.—WHAT CIRCUMSTANCES GOVERN COURTS IN CONSTRUING INSTRUMENTS AND TRANSACTIONS.—PAROL EVIDENCE ADMISSIBLE TO SHOW INTENTION.—WHY IT IS ADMITTED.—WHAT NECESSARY TO BE SHOWN TO CONVERT AN ABSOLUTE CONVEYANCE INTO A MORTGAGE.—CONSTRUCTION IN CASES WHERE THERE IS DOUBT AS TO THE INTENTION.—WHO IS TO DETERMINE THE QUESTION OF MORTGAGE OR NO MORTGAGE.—WHY A MORTGAGE MUST BE IN WRITING.—ACKNOWLEDGMENTS, ETC.—MORTGAGES BY BILLS OF LADING, BY FACTOR, ETC., ETC.—LEASES WITH CONDITIONS.—MORTGAGES WITH BLANKS.

§ 18. A mortgage, as has been stated in the preceding chapter, is an instrument in writing: it is in writing for the reason that the registration laws of the various States require, as an essential element of good faith, that creditors and others dealing with the mortgagor may have notice of the exact condition of his property, and to prevent fraud and deception. As between the parties to the transaction, it may be by a verbal agreement to give and accept certain chattels as security for a debt. If in writing, it need not be registered, and is good between the parties, without complying with the statutory provisions, as regards its validity as to third persons and creditors. A mortgage is an instrument in writing, in the nature of an absolute conveyance or sale, with a condition. A condition is a qualification or restriction annexed to a conveyance, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor subsequently does or fails to do a

particular act, the conveyance shall become absolute or void. A condition in a deed defeating the conveyance, in a certain event, is a condition subsequent. Such conditions are generally found in mortgages. There may be a conveyance which, on its face is absolute, and still be a mortgage—as where an absolute bill of sale is made, and a separate instrument executed by the grantee, wherein the condition for redemption or release is stated, and this is termed a defeasance. The condition may also be a mere verbal agreement between the parties, to be established by proof, the same as any other fact; and in this respect the principles of law are equally applicable to chattel and real estate mortgages.

§ 19. **What constitutes a Mortgage.**—No particular words or form of conveyance is necessary to constitute a mortgage,[1] a mortgage being a security.

The general rule is, that whenever a conveyance or assignment of property is originally intended as a security for money, whether this intention appears from the conveyance itself, or any other instrument, it is always considered as a mortgage, and redeemable, even though there is an agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or a particular description of persons.[2]

[1] Woodworth v. Guzman, 1 Cal. 203.

[2] Newcomb v. Bonham, 1 Vern. 7; Howard v. Harris, 1 Id. 83; Talbot v. Braddyl, 1 Id. 183; Barrel v. Sabine, 1 Id. 268; Manlove v. Ball, 2 Id. 84; Jennings v. Ward, 2 Id. 520; Price v. Perrie, 2 See. 258; Francklyn v. Fenn, Barn. Ch. 30; Clench v. Withal, cas. T. Finchli, 376; Cooke v. Cooke, 2 Atk. 67; Mellor v. Lees, 2 Atk. 494; Cottrel v. Purchase, cas. T. Talb. 61; Floyer v. Lavington, 1 P. W. 268; Bigelow v. Topliff, 25 Vt. 273; Austin v. Downer, 25 Id. 558; Whitney v. French, Id. 663; Whiting v. Eichelberger, 16 Iowa, 422; Carothers v. Hunt, 18 Iowa, 576; Welch v. Morrow, 38 Ala., 125; Bank, etc., v. White, 3 Md. Ch. 508; Pearson v.

Mortgages usually contain two parts, the conveyance and the defeasance. It is not essential, however, that the defeasance should be inserted in the mortgage; for a

Seay, 38 Ala. 643; Howe v. Russell, 36 Me. 115; Yarborough v. Newell, 10 Yerg. 376; Smith v. Pearson, 24 Ala. 358; Delahay v. McConnell, 5 Ill. 156; Ing v. Brown, 3 Md. Ch. 521; Scott v. Henry, 13 Ark. 112; Nichols v. Cape, 3 Head, 92; Nickson v. Toney, Id. 665; Williams v. Bishop, 15 Ill. 553; Campbell v. Worthington, 6 Vt. 448; Mott v. Harrington, 12 Id. 119; Wilson v. Drumrite, 21 Mo. 325; Lambert v. Ingraham, 15 B. Mon. 265; Cross v. Helbner, 7 Ind. 359; Tibeau v. Tibeau, 22 Mo. 70; Rogan v. Walker, 1 Wis. 527; Young v. Epperson, 14 Tex. 618; Barfield v. Cole, 4 Sneed, 465; Toler v. Bender, 1 D. & B. Eq. 445; Yates v. Yates, 21 Wis. 473; Catlin v. Chittenden, Brayt. 163; Hinson v. Partee, 11 Humph. 587; McCann v. Marshall, 7 Id. 121; Webb v. Patterson, Id. 431; Bennett v. Union Bank, 5 Id. 612; Nichols v. Reynolds, 1 R. I. 30; Halo v. Schick, 57 Penn. 320; Pattison v. Horn, 1 Grant, 301; Wright v. Bates, 13 Vt. 341; Kidd v. Temple, 22 Cal. 255; Lodge v. Turman, 24 Id. 385; Crassen v. Swoveland, 22 Ind. 427; Guthrie v. Kale, 46 Penn. 331; Preshbacker v. Freeman, 32 Ill. 475; Richardson v. Barrick, 16 Iowa, 407; Snyder v. Griswold, 37 Ill. 216; Roberts v. Richards, 36 Ill. 339; Hill v. Edwards, 11 Ill. 22; Robinson v. Farrelly, 16 Ala. 472; French v. Burns, 35 Conn. 363; Belton v. Avery, 2 Root, 279; French v. Lyon, Id. 69; Crews v. Threadgill, 35 Ala. 334; Baxter v. Deer, 24 Tex. 17; People v. Irwin, 14 Cal. 428; Plummer v. Shirley, 16 Ind. 380; Vanderhaize v. Hugues, 2 Beasley, 244; Lockersen v. Stilwell, Id. 357; Rhines v. Baird, 41 Pa. 256; Roberts v. McMahon, 4 Greene (Iowa), 34; Graham v. Stevens, 34 Vt. 166; Steel v. Steel, 4 Allen, 417; Holliday v. Arthur, 25 Iowa, 19: Phœnix v. Gardner, 13 Minn. 430; Bingham v. Thompson, 4 Nev. 224; Cotterell v. Young, 20 Ohio, 464; De Camp v. Crane, 19 N. J. Eq. 166; Somerset v. Roberts, 38 N. Y. 22; Miami &c. Co. v. U. S. Bank, Wright (O.), 249; Meyers Appeal, 42 Pa. 518; Wheeler v. Ruston, 19 Ind. 334; Artz v. Grove, 21 Md. 456; Vasser v. Vasser, 23 Miss. 378; Davis v. Clay, 2 Mo. 161; Shays v. Norton, 48 Ill. 100; Phillips v. Hulzizer, 20 N. J. Eq. 308; Harper's Appeal, 64 Penn. 315; Barnard v. Jameson, 27 Mich. 230; Cannan v. McNab, 48 Ala. 99; Hunt v. Rousmanière, 1 Pet. 1; Johnson v. Huston, 17 Mo. 38; Overton v. Bigelow, 3 Yerg. 513; Russell v. Southard, 12 How. 139; Patterson v. Johnston, 7 Ohio, 225; Turner v. Kerr, 44 Mo. 429; Crane v. De Camp, 21 N. J. Eq. 414; Klinck v. Price, 4 W. Va. 4; Stokes v. Hollis, 43 Ga. 462; Bunnacleugh v. Poolman, 3 Daly, 236; Dixon v. Parker, 2 Ves. 225; Maxwell v. Montacute, Pre. in Ch. 526; Dougherty v. McCrady, 6 G. & J. 275; Miller v. Thomas, 19 Ill. 228; Davis v. Hopkins, 15 Id. 519; Smith v. Siskett, Id. 528.

incident to every conveyance, which is in substance a security for a debt.[1]

A mortgagor may lease his equity of redemption to the mortgagee, at a time subsequent to the original transaction. Such releases will be closely scrutinized by courts; the fairness of the transaction, and the value received by the mortgagor, must be shown by clear and satisfactory evidence.[2]

[1] Skinner v. Miller, 6 Litt. 184; Howard v. Harris, 1 Vern. 190; James v. Oades, 2 Vern. 402; Walling v. Aiken, 1 McMull, 1; Youle v. Richards, Saxt. 534; Wilcox v. Morris, 1 Murph. 117; Heister v. Madeira, 3 W. & S. 184; Stover v. Bounds, 1 Ohio S. 107; Pointdexter v. McCannon, 21 Mo. 325; Rogan v. Walker, 1 Wis. 527; Henry v. Clark, 7 Johns. Ch. 20; Woods v. Wallace, 55 Penn. 175; Jacques v. Weeks, 7 Watts, 261; Clark v. Henry, 2 Cow. 324; Robinson v. Farrelly, 16 Ala. 672; Rankin v. Mortimer, 7 Watts, 372; Asay v. Hoover, 5 Penn. 21; Johnston v. Gray, 16 S. & R. 361; McGaw v. Marshall, 7 Humph. 721; Baldwin v. Jenkins, 23 Miss. 206; McDonald v. McLeod, 1 Ired. Eq. 221; Somersworth, &c. v. Roberts, 38 N. H. 22; Woodruff v. Robb, 19 Ohio, 212; English v. Lane, 1 Port. 328; Nichols v. Reynolds, 1 R. I. 30; Robinson v. Chapman, 6 Paige, 480; Locke v. Palmer, 26 Ala. 312; Reed v. Lansdale, Hardin, 6; Weathersby v. Weathersby, 40 Miss. 462; Parks v. Hall, 2 Pick. 211; Miami, &c. Co. v. U. S. Bank, Wright (O.) 249; Williams v. Owens, 10 Sim. 386; Vasser v. Vasser, 23 Miss. 378; Catlin v. Chittenden, Brayt. 163; Lane v. Shears, 1 Wend. 433; Flagg v. Mann, 2 Sumn. 490; Dougherty v. M'Gollgan, 6 G. & J. 275; Thorpe v. Ricks, 1 D. & B. Eq. 613; Wright v. Bates, 13 Vt. 341; Lewis v. Owen, 1 Ired. Eq. 291; Weed v. Stevenson, 1 Clarke, 166; Hicks v. Hicks, 5 G. & J. 46; Shays v. Norton, 48 Ill. 100; Menude v. Poloney's Ex'rs. 2 Dess. 341; Delaine's Ex'rs v. Keenan, 2 Ib. 74; Erskine v. Townsend, 2 Mass. 493; Taylor v. Weld, 5 Ib. 109; Carey v. Rawson, 8 Ib. 159; Harrison v. Phillips Academy, 12 Id. 406; Scott v. McFarland, 13 Id. 309; Eaton v. Whiting, 3 Pick. 484; Stocking v. Fairchild, 5 Pick. 181; Lanfair v. Lanfair, 18 Pick. 299; Nugent v. Riley, 1 Met. 117; Philips v. Croft, 42 Ala. 477; Rice v. Rice, 4 Pick. 349; McKnight v. Gordon, 13 Rich. Eq. 222; Fowler v. Rice, 17 Pick. 100; Tilson v. Moulton, 23 Ill. 648; Steel v. Steel, 4 Allen, 417; Smith v. Beattie, 31 N. Y. 542; Anthony v. Anthony, 23 Ark. 429; Davis v. Hubbard, 38 Ala. 185; Clark v. Condit, 3 Green, N. J. 358; Houser v. Lamont, 55 Penn. 311; Sears v. Dixon, 33 Cal. 326; Parmlee v. Laurence, 44 Ill. 405.

[2] Holdridge v. Gillespie, 2 Johns Ch. 34; Hammond v. Hopkins, 3 Yerg. 525; McKinstry v. Conly, 12 Ala. 678; Hicks v. Hicks, 5 G. & J. 85; McGan v. Marshall, 7 Humph 121; Mills v. Mills, 26 Conn. 513.

In the ordinary form of a mortgage it is apparent on its face, by the note or bond to which it refers, that it creates a debt to the grantee, and is executed to secure such indebtedness. The effect will be the same where the true object of the conveyance is shown by any other instrument or defeasance, although not referred to in the conveyance itself.[1]

A stipulation in the conveyance itself, or in any separate instrument executed at the same time, and constituting with it one transaction, that the property shall be reconveyed upon the payment of the money or the performance of the conditions, constitutes a defeasance, and such conveyance will be considered and treated, in all respects as a mortgage.[2]

[1] Dey v. Dunham, 2 Johns. Ch. 182; Jackson v. Green, 4 Id. 186; Cooper v. Whitney, 3 Hill, 95; Blaney v. Pearce, 2 Me. 132; Bunnock v. Whipple, 12 Id. 346; Palmer v. Guernsey, 7 Wend. 248; Breckinridge v. Hull, 1 La. 148; Taylor v. Weld, 5 Mass. 109; Harrison v. Lemon, 3 Black, 51; Lanfair v. Lanfair, 18 Pick. 299; Nugent v. Riley, 1 Met. 117; Bloodgood v. Zailly, 2 Caines, 124; Hughes v. Edwards, 9 Wheat. 489; Stoever v. Stoever, 9 S. & R. 434; Miller v. Thomas, 14 Ill. 428; Wharf v. Howell, 3 Binn. 499.

[2] Anon, 2 Hay, 26; Baxter v. Dear, 24 Tex. 77; Merrick v. Avery, 14 Ark. 370; Brown v. Mickle, 6 Penn. 390; Kellum v. Smith, 33 Penn. 158; Peterson v. Clark, 15 Johns. 205; Dimond v. Enoch, Addison, 357; Blaney v. Pearce, 2 Me. 133; Kerr v. Gilmore, 6 Watts, 405; Colwell v. Woods, 3 Ib. 183; Harrison v. Lemon, 3 Blackf. 51; Watkins v. Gregory, 6 Id. 113; Mills v. Darling, 43 Me. 565; Marshall v. Stewart, 17 Ohio, 356; Stoever v. Stoever, 9 S. & R. 434; Hammond v. Hopkins, 3 Yerg. 525; Reynolds v. Scott, Brayt. 73; Plato v. Roe, 14 Wis. 453; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamblin, 97 Mass. 489; Sharkey v. Sharkey, 47 Mo. 543; Robinson v. Willoughby, 65 N. C. 520; Holton v. Meighen, 15 Minn. 69; Tredler v. Darrin, 59 Barb. 65; Gubbins v. Harper, 7 Phila. 276; Erskine v. Townsend, 2 Mass. 493; Taylor v. Weld, 5 Id. 109; Carey v. Rawson, 8 Id. 169; Harrison v. Phillips Academy, 12 Id. 456; Scott v. McFarland, 13 Id. 309; Stocking v. Fairchild, 5 Pick. 181; Eaton v. Whiting, 3 Id. 484; Lanfair v. Lanfair, 18 Id. 299; Nugent v. Riley, 1 Met. 117; Warren v. Lovis, 53 Me. 463; Parmlee v. Lawrence, 44 Ill. 405; Montgomery v. Chadwick, 7 Iowa, 114; Wharf v. Howell, 5 Binn. 499; Rice v. Rice, 4 Pick. 389; Holmes v. Grant, 8 Paige, 245; Miller v. Thomas, 14 Ill. 428; Cross v. Hepner, 7 Ind. 359.

separate instrument for that purpose is equally valid and effectual.[1] Courts do not look with favor upon the practice of executing the defeasance as a separate instrument, because it is liable to accidents and abuses; or it may be a mode of committing frauds, and, besides this, the defeasance may be lost, thus leaving an apparently absolute title in the grantee.[2] The general rule is, that the defeasance and the deed must be parts of the same transaction to constitute a mortgage. No conveyance will be considered a mortgage, unless it became such at the time of its inception; and it can never become one by a subsequent act.[3] It is not essential that the date of the deed and of the defeasance should be the same, as they will constitute a mortgage if delivered together:[4] nor that there should be a *written* defeasance executed at the same time with the absolute deed; for, if there is a verbal agreement that a defeasance shall be executed on request, and such defeasance is subsequently executed and delivered to the grantor, it will relate back to the deed, and make it a mortgage.[5] The law does not require that a defeasance shall be expressed in any particular form of language. It will be sufficient if it clearly appears that, upon payment of the debt by the grantor, the conveyance

[1] Vanderhaise v. Hugues, 2 Beas. 410; Snyder v. Griswold, 37 Ill. 216; Guthrie v. Kohle, 46 Penn. 331; Second Ward Bank v. Upmann, 12 Wis. 499; Crassen v. Swoveland, 22 Ind. 427; Hill v. Edwards, 11 Minn. 22; Daubenspick v. Platt, 22 Cal. 330.

[2] Cottrell v. Purchase, Cas. Temp. Talb. 61; Jaques v. Weeks, 7 Watts, 261; Baker v. Wind, 1 Ves. Sen. 160; Bickford v. Daniels, 2 N. H. 71.

[3] Lund v. Lund, 1 N. H. 39; Bickford v. Daniels, 2 Id. 71; Bryan v. Cowart, 21 Ala. 92; Reitenbaugh v. Ludwick, 31 Penn. 131; Holmes v. Grant, 8 Paige, 243; Swetland v. Swetland, 3 Mich. 482; Freeman v. Baldwin, 13 Ala. 246.

[4] McIntier v. Shaw, 6 Allen, 83; Blaney v. Branch, 2 Me. 22; Kelly v. Thompson, 7 Watts, 401; Bryan v. Cowart, 21 Ala. 92; Swetland v. Swetland, 3 Mich. 482.

[5] Lovering v. Fogg, 18 Pick. 540; Wilson v. Shoenberger's Ex'rs, 31 Penn. 295; Reitenbaugh v. Ludwick, Id. 131; Montgomery v. Chadwick, 7 Iowa, 114.

shall become void, or that the grantee will reconvey to the grantor.[1]

When the money paid on account of a conveyance, instead of enuring absolutely to the grantor, creates a debt to the grantee, it partakes of the defeasible nature of the consideration, and takes effect as a mortgage. The result is the same where no provision is made for the repayment of the money, either in the conveyance itself or in any accompanying instrument, if it is clearly shown to be a debt which the grantor is entitled to repay.[2]

Whenever a transaction resolves itself into a security, it is a mortgage,—and this, whether it is a security, either for an antecedent debt, or for advances made at the time, and entitles the debtor to a release of his property on payment of the debt. This right of redemption or release is not only independent of the agreement, but paramount to it, and may be enforced without regard to the form of conveyance, and even in opposition to its terms. Every one may renounce a right introduced for his benefit. "*Quilibet potest renunciare juri pro se inducto.*" But no waiver or renunciation by a mortgagor of the right of redemption, however express, will be allowed to impair his power of exercising it himself, or transferring it to another. It has its origin in a general policy, superior to particular agreement and is a necessary and inseparable

[1] Weed v. Stevenson, Clarke's Ch. 166; Steel v. Steel, 4 Allen, 417; Bayley v. Bailey, 5 Gray, 505; Webb v. Patterson, 7 Humph. 431; McGan v. Marshall, Id. 121; Colwell v. Woods, 3 Watts, 188; Brown v. Mickle, 7 Penn. 390; Perkins v. Dibble, 10 Ohio, 433; Baldwin v. Jenkins, 23 Miss. 206; Gillis v. Martin, 2 Dev. Eq. 470.

[2] Russell v. Southard, 12 How. 139; Flagg v. Mann, 2 Sumner, 486; Brant v. Robinson, 16 Mo. 129; Edrington v. Harper, 3 J. J. Marsh, 353; Bacon v. Brown, 19 Conn. 29; Jarvis v. Woodruff, 22 Conn. 548; Wharf v. Howell, 5 Binn. 499; Robinson v. Farrelly, 16 Ala. 432.

it was executed may be looked into in determining what was their intention;[1] consequently, the nature of these circumstances and relations may be shown by parol evidence, not for the purpose of contradicting the instrument, but of raising an equity paramount to its terms, or proving one superior to it. And a bill of sale of chattels may be shown to be a mortgage by the same evidence that would produce that effect in the case of an absolute conveyance of real estate.[2]

[1] Williams v. Bishop, 15 Ill. 553; Tibeau v. Tibeau, 22 Mo. 70; Overton v. Bigelow, 3 Yerg. 513; Carter v. Carter, 5, Tex. 93; Eland v. Radford, 7 Ala. 724; Robinson v. Campbell, 2 Cal. 421; Crane v. Bonnell, 1 Green, Ch. 264; Ketcham v. Johnson, 3 Green, 370; Wheeland v. Swartz, 1 Yeates, 579; Bentley v. Phelps, 2 W. & M., 426; Russell v. Southard, 12 How. 139; Brant v. Robertson, 16 Mo. 29; Miller v. Thomas, 14 Ill. 128; Rich v. Doane, 35 Vt. 125; King v. Newman, 2 Munf. 40; Watson v. James, 15 La. Ann. 356; Bishop v. Williams, 18 Ill. 101; McCarron v. Cassidy, 18 Ark. 34; Parish v. Gates, 29 Ala. 254; Snyder v. Griswold, 37 Ill. 216; Lodge v. Turman, 24 Cal. 385.

[2] Morgan v. Shinn, 15 Wall. 105; Dabney v. Green, 4 H. & N. 101; Rosso v. Norvell, 1 Wash. 14; Parks v. Hall, 8 Pick, 206; Brogden v. Walker, 2 H. & J. 282; Craft v. Bullard, M. & S. Ch. 366; Reed v. Jewett, 5 Me. 96; Davis v. Hopkins, 15 Ill. 519; Reigard v. McNeill, 38 Iil. 400; Leighman v. Marshall, 17 Md. 550; Swart v. Service, 21 Wend. 36; Webb v. Rice, 1 Hill, 606; Caswell v. Keith, 12 Gray, 351; Hodges v. Ins. Co. 8 N. Y. 416; Connor v. Chase, 15 Vt. 764; Hayworth v. Worthington, 5 Blackf. 361; Kimbrough v. Smith, 2 Dev. Eq. 558; Scott v. Haney, 13 Ark. 12; Hyndman v. Hyndman, 19 Vt. 9; Couch v, Sutton, 1 Grant, 114; Fuller v. Parrish, 3 Mich. 211; Wright v. Bates, 13 Vt. 341; Patterson v. Horn, 1 Grant, 301; Blanchard v. Keaton, 4 Bibb, 451; Carter v. Burns, 18 Miss. 527; Stamper v. Johnson, 3 Tex. 1; Hinson v. Porter, 11 Humph. 587; Despard v. Walbridge, 15 N. Y. 374; McDonald v. McLeod, 3 Ired. Eq. 221; Tyler v. Strang, 21 Barb. 198; Arnold v. Mattison, 3 Rich. Eq. 153; Mead v. Randolph, 3 Tex. 142; Fowler v. Stoneman, 11 Tex. 478; Hannay v. Thompson, 14 Tex. 142; Mann v. Falcon, 25 Tex. 271; Babcock v Wyman, 19, How. 289; Glass v. Hulbert, 102 Mass. 37; Rogan v. Walker, 1 Wis. 527; Plato v. Roe, 14 Wis. 453; Gay v. Hamilton, 33 Cal. 686; Bishop v. Bishop, 13 Ala. 475; Phillips v. Hulsizer, 20 N. J. Eq. 308; Hill v. Loomis, 42 Vt. 562; Bryant v. Cowart, 21 Ala. 92; Lock v. Palmer, 26 Ala. 312; Kent v. Agard 24 Wis. 379; Saunders v. Stewart.

The proof in such cases should be clear, satisfactory

7 Nev. 200; Blakemore v. Byrnside, 1 Ark. 505; Wilcox v. Bates, 26 Wis. 467; Carr v. Carr, 52 N. Y. 251; Jordan v. Fenno, 13 Ark. 593; Kerr v. Gilmore, 6 Watts, 414; Farmer v. Gross, 42 Cal. 169; Pierce v. Robinson, 13 Cal. 116; Todd v. Rivers, 1 Dess. 155; Moore v. Wade, 8 Kan. 380; Jones v. Jones, 1 Head. 105; Mehan v. Forrester, 52 N. Y. 277; Church v. Cole, 36 Ind. 34; Guinn v. Locke, 1 Head, 110; West v. Hendrix, 28 Ala. 226; Wilson v. Patrick, 34 Iowa, 362; People v. Irwin, 14 Cal. 428; Leahy v. White, 8 Nev. 147; Russell v. Southard, 12 How. 139; Johnson v. Sherman, 15 Cal. 287; Decker v. Leonard, 6 Lans. 264; Baische v. Oakley, 68 Pa. 92; Cunningham v. Hawkins, 27 Cal. 603; Brantley v. West, 27 Ala. 542; Hopper v. Jones, 29 Cal. 18; Steinrich's Appeal, 70 Penn. 289; James v. Johnson, 6 Johns. Ch. 417; McIntyre v. Humphries, 1 Hoff. Ch. 31; Clark v. Henry, 2 Cow. 324; Tibeau v. Tibeau, 22 Mo. 77; Flagg v. Mann, 2 Sumn. 538; Thomas v. McCormick, 9 Dana, 109; Swetland v. Swetland, 3 Mich. 645; Hunt v. Rousmaniere, 1 Pet. 1; Whittick v. Kane, 1 Paige, 206; Wadsworth v. Lonanger, Harr. (Mich.) 113; Trucks v. Lindsay, 18 Iowa, 504; Reading v. Weston, 8 Conn. 117; Strong v. Stewart, 4 Johns. Ch. 167; Jackson v. Lodge, 36 Cal. 28; Murphy v. Tripp, 1 Mon. 73; Roach v. Cozine, 9 Wend. 227; Washburn v. Merrill, 1 Day. 139; Hudson v. Isbell, 5 S. & P. 67; Deshaz v. Lewis, 5 S. & P. 91; Marks v. Pell, 1 Johns. 594; English v. Lane, 1 Port. 328; Johnson v. Clarke, 5 Ark. 321; Collins v. Tillou, 26 Conn. 368; Yarborough v. Newell, 10 Yerg. 376; Lane v. Dickerson, 10 Yerg. 373; Streator v. Jones, 3 Hawks. 423; Randall v. Phillips, 3 Mason, 378; Hovey v. Holcomb, 11 Ill. 660; Morris v. Nixon, 1 How. 118; Franklin v. Roberts, 2 Ired. Eq. 560; Shaver v. Woodward, 28 Ill. 277; Kelly v. Bryan, 6 Ired. Eq. 283; Bright v. Wagle, 3 Dana, 238; Roberts v. McMahon, 4 Greene (Iowa), 34; Thompson v. Patten, 5 Litt. 74; Champlin v. Butler, 18 Johns. 69; Green v. Ball, 32 Me. 313; Brown v. Dewey, 2 Barb. 28; Bacon v. Brown, 19 Conn. 33; Emerson v. Atwater, 7 Mich. 12; Reitenbaugh v. Ludwick, 31 Penn. 131; Howard v. Odell, 1 Allen, 85; Blake v. Morrison, 33 Miss. 123; Gibson v. Moulton, 23 Ill. 648; Johnson v. Houston, 17 Mo. 58; Bank v. White, 1 Md. Ch. 536; McLane v. Smith, 5 Minn. 178; Carlyou v. Lannan, 4 Nev. 156; Lokerson v. Stillwell, 2 Beas. 357; Vasser v. Vasser, 23 Miss. 378; Condit v. Tichenor, 19 N. J. Eq. 43; Beloit v. Morrison, 8 Minn. 87; Anding v. Davis, 38 Miss. 574; Crane v. Buchanan, 29 Ind. 570; Smith v. Pearson, 24 Ala. 358; Tibbs v. Morris, 44 Barb. 138; Preschbaker v. Fearman, 32 Ill. 475; Ing v. Brown, 3 Md. Ch. 521; Key v. McCleary, 25 Iowa, 191; Sutphen v. Cushman, 35 Ill. 186; Sellers v. Stalecup, 7 Ired. Eq. 13; Maxwell v. Montacute, Pre. Ch. 526; Walker v. Walker, 2 Atk. 99; Phœnix v. Gardner, 13 Minn. 430; Dixon v. Parker, 2 Ves. 225; Young v. Peachy, 2 Atk. 207; Stewart v. Hutchins, 13 Wend. 485;

and convincing, as it opens a wide door for perjury.[1] The rule in equity has been well settled as to the admissibility of this class of evidence, where the defeasance was omitted by accident, fraud, or mistake, and relaxed so as to admit it under all circumstances; as it would be permitting a grantee to perpetrate a fraud, by sustaining a transaction of this kind as an absolute sale or conveyance. Courts of law, and courts under the Code system, where in vogue in the United States, have not so generally adopted this rule. At common law, under the ancient system of mortgages, there was no right of redemption; courts of equity, carrying out the intention of the parties, established this right, and courts of law have followed in the same direction until it has become universally recognized in this country and in England. While many, if not the greater portion, of the cases cited in the foregoing note are equity cases, and the questions have

Joynes v. Statham, 3 Atk. 388; May v. Eustin, 2 Port. 414; Franklin v. Fenn, Barn. Ch. 30; Cotterell v. Purchase, Cas. T, Talb. 61; Bingham v. Thompson, 4 Nev. 224; Spurgeon v. Collier, 1 Eden, 55; Langton v. Horton, 5 Beav. 9; Green v. Bonnell, 1 Green Ch. 264; Holmes v. Matthews, 9 Moore, P. P. C. 413; Walton v. Cronly, 14 Wend. 63; Barnhard v. Greenshields, 9 Moore, P. P. C. 16; Conwell v. Evill, 4 Blackf. 67; Bell v. Carter, 17 Beav. 11; Murphy v. Taylor, 1 Irish, Ch. R. 92; Freeman v. Baldwin, 13 Ala. 256; Lindley v. Sharp, 7 Mon. 248; Overton v. Bigelow, 3 Yerg. 513; Miami, &c., Co. v. U. S. Bank, Wright (Ohio), 249; Blair v. Bass, 4 Blackf. 539; Delahay v. McConnell, 5 Ill. 156; Jones v. Blum, 2 Rich. 475; Taylor v. Luther, 2 Sumner, 228; Slee v. Manhattan Co. 1 Paige, 48; Whittrick v. Kane, 1 Paige, 202; Van Buren v. Olmstead, 5 Paige, 1; Lee v. Evans, 8 Cal. 424; Low v. Henry, 9 Cal. 598; Parish v. Gates, 27 Ala. 254; Anon, 2 Hay. 26; Chester v. Bank, 16 N. Y. 336; McLaughlin v. Wright, 2 Ired. Ch. 94; Brothers v. Harrill, 2 Jones Eq. 209; Hazard v. Loring, 10 Cush. 267; Bishop v. Williams, 18 Ill. 101; McCarron v. Cassidy, 18 Ark. 34; Carter v. Carter, 5 Tex. 93; Miller v. Thomas, 14 Ill. 428; Kunkle v. Wolfersberger, 6 Watts, 126; Kemp v. Earp, 7 Ired. Eq. 167; Purviance v. Holt, 8 Ill. 394; Chapman v. Hughes, 14 Ala. 218.

[1] McKinstry v. Conly, 12 Ala. 678: Colwood v. Waring, 3 Jones Eq. 330; Turnipseed v. Cunningham, 16 Ala. 501.

been raised before a chancellor, there is no reason why it should not become a settled rule in courts of law. The distinction between law and equity, in any country, is never a permanent one. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will be ranked under the strict law of the next. Such has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law; so that there is no difference between the two systems. If it is a fraud in a court of equity to allow a grantee or vendee to take advantage of the necessities of a grantor, and obtain an absolute conveyance as security for a loan, without affording him relief, is it any less so in a court of law? An adoption of this equitable rule, of admitting parol evidence in courts of law, and having the facts found by a jury or the court, as to the intent of the parties and the nature of the transaction, should become universal in all courts of law, irrespective of the fact that there may be a court of chancery in the same State, in which such matters may be adjudicated; so that the rights of parties may be protected, and the same relief afforded at law as the party could obtain or be entitled to in a court of equity. In States where there are no equity courts, such is the general rule. Every case of this character must be decided in view of the peculiar circumstances which belong to it; as the only safe criterion is the intention of the parties.[1]

Where a vendee retains the right to demand repayment, notwithstanding the purchase, and although the

[1] Cornell v. Hall, 22 Mich. 377.

property should be lost, it is conclusive to show that the transaction was intended as a security, and not as a conditional sale.[1] So, taking a judgment for the amount of the consideration mentioned in a conveyance absolute on its face, is evidence that it is a mortgage.[2]

§. 22. **Proof required to Convert an Absolute Conveyance into a Mortgage.**—In order to convert an absolute conveyance into a security for money loaned, it must be alleged and proved:—1st, That the interest of the grantor should be assigned as a mere security for the debt; 2nd, that the grantor was induced to execute it by accident, ignorance, mistake, fraud, undue influence, or surprise;[3] and that the intention of the parties was to secure a debt or loan, which should be clearly made to appear.[4]

Another method of determining whether a transaction is to be regarded as a mortgage or conditional sale is, whether the consideration was adequate to induce a sale? When no fraud is practised, and no inequitable advantages are taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate; and therefore, in the adjudications on this subject, great stress

[1] Robinson v. Farrelly, 16 Ala. 472.

[2] Hamet v. Dundass, 4 Penn. 178.

[3] Cook v. Gudger, 2 Jones Eq. 172; Glisson v. Hill, 2 Id. 256; McKinstry v. Conley, 12 Ala. 678; English v. Lane, 1 Porter, 328; Smith v. Pearson, 24 Ala. 358; Farrell v. Bean, 10 Ind. 217; Scott v. Henry, 13 Ark. 112.

[4] Williams v. Cheatham, 14 Ark. 218; Corbitt v. Smith, 8 Iowa, 160; May v. Eustin, 2 Port. 414; Freeman v. Baldwin, 13 Ala. 246; Bishop v. Bishop, 13 Ala. 475; Bryan v. Cowart, 21 Ala. 92; Harris v. Miller, 30 Ala. 231; English v. Lane, 1 Port. 328; Lane v. Dickerson, 10 Yerg. 373; Conwell v. Evill, 4 Blackf. 67; Scott v. Britton, 2 Yerg. 215; Bingham v. Thomson, 4 Nev. 224; Williams v. Stratton, 18 Miss. 418; Moore v. Ivey, 8 Ired. Eq. 192; Arnold v. Mattison, 3 Rich. Eq. 153; Price v. Kames, 59 Ill. 276; Cook v. Gudger, 2 Jones Eq. 772; McKinstry v. Conley, 12 Ala. 678; Vasser v. Vasser, 23 Miss. 378; Sewell v. Price, 32 Ala. 97; Read v. Jewett, 5 Me. 96; West v. Hendrix, 28 Ala. 226.

is justly laid upon the fact, that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. And gross inadequacy may be regarded as evidence of the intention of the parties, in cases where there is any doubt in regard to the transaction.[1]

To determine whether a bill of sale is a mortgage or not, it is a well established rule, that courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it; such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances verbal or written, as well as the acts and declarations of the parties—and will decide on the whole circumstances taken together. A mortgage may be presumed from the conditions and circumstances of a conveyance.[2] So that whenever it is made to appear, by any means of proof, that a conveyance was intended as a security for a debt due by the grantor or vendor, payment of such debt will entitle the debtor to a reconveyance or release of his property.[3]

[1] Scott v. Henry, 13 Ark. 112; Davis v. Stonestreet, 4 Ind. 101; McLaurin v. Wright, 2 Ired. Ch. 94; Hudson v. Isbell, 5 S. P. 67; Todd v. Hardie, 5 Ala. 698; Holmes v. Grant, 8 Paige, 243; Sellers v. Stalcup, 7 Ired. Eq. 13; Elliott v. Maxwell, 7 Ib. 246; LeBlanc v. Boucherean, 16 La. 11; McKinney v. Miller, 19 Mich. 142; English v. Lane, 1 Porter, 328; Russell v. Southard, 12 How. 139; Brown v. Dewey, 2 Barb. 28; Bentley v. Phelps, 2 W. & M. 426; Parish v. Gates, 29 Ala. 284; Wilson v. Weston, 4 Jones Eq. 349; Conway v. Alexander, 7 Cranch, 241; Morris v. Nixon, 1 How. 126; Vernon v. Bethel, 2 Eden, 110; Oldham v. Halley, 2 J. J. Marsh. 114; Edrington v. Harper, 3 Id. 334.

[2] Whitecomb v. Sutherland, 18 Ill. 578.

[3] Morris v. Nixon, 1 How. 118; Taylor v. Luther, 2 Sumner, 228; Rogan v. Walker, 1 Wis. 527; Roach v. Cosine, 9 Wend. 227; Walton v. Crowley, 14 Wend. 63; Slee v. Manhattan Co., 1 Paige, 48; Strong v. Stewart, 4 Johns. Ch. 167; Henry v. Davis, 7 Id. 40; Clark v. Henry, 2 Cow. 324; Cross v. Hipner, 7 Ind. 359; Wright v. Bates, 13 Vt. 341; Bigelow v. Topliff, 25 Vt. 235; Baxter v. Wiley, 27 Id. 276; Kunkle v. Wolfersberger, 6 Watts, 126; Hamilton v. Marlborough, 2 W. & M. 168;

§ 23. **Construction in cases of Doubt.**—Where it is doubtful, on its face, whether an absolute conveyance operates as a conditional sale or a mortgage, the courts generally treat it as a mortgage; for the reason that such a construction will be most apt to attain the ends of justice and prevent fraud and oppression;[1] and will not allow a grantee to hold the property discharged of the parol trusts or conditions, which were attached to it by his consent.[2]

Conditional sales are not favored in law.[3] Courts of equity often pronounce that to be an equitable mortgage, which at law would be considered a conditional sale. And if a conveyance, no matter what its form, may resolve itself into a security for the performance or non-performance of any act, it is a mortgage. Thus, on a bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months

Stepp v. Johnston, 7 Dana, 296; Delehay v. McConnell, 5 Ill. 156; Brainerd v. Brainerd, 15 Conn. 573; Tibeau v. Tibeau, 22 Mo. 77; Yarborough v. Newell, 10 Yerg. 375; Streator v. Jones, 3 Hawks, 423; Hauser v. Lash, 2 D. & B. Eq. 212; McBrayer v. Roberts, 2 Dev. Eq. 75; English v. Lane, 1 Port. 328; Hannay v. Thompson, 14 Tex. 142; Hamet v. Dundas, 4 Penn. 178; McLannahan v. McLannahan, 6 Humph. 99; Prewett v. Dobbs, 21 Miss. 440; Wilson v. Drumrite, 21 Mo. 325; Baldwin v. Jenkins, 23 Mo. 206; Vasser v. Vasser, 23 Miss. 378; Cottrell v. Long, 20 Ohio, 464; Stamper v. Johnston, 3 Tex. 14; Bank v. Whyte, 1 Md. Ch. 556; Russell v. Southard, 12 How. 139; Babcock v. Wyman, 19 How. 289; Jenkins v. Eldredge, 3 Story, 393; Howe v. Russell, 36 Me. 115.

[1] Bacon v. Brown, 19 Conn. 34; Russell v. Southard, 12 How. 139; McNeil v. Nosworthy, 39 Ala. 156; Galt v. Jackson, 9 Ga. 157; Pensoneau v. Pullian, 47 Ill. 58; Garther v. Teague, 7 Ind. 460; Honore v. Hutchins, 8 Bush, 687; Cornell v. Hall, 23 Mich. 377; Conway v. Alexander, 7 Cranch, 237; Menunde v. Delaire, 2 Dess. 564; Baxter v. Wiley, 9 Vt. 276; Holmes v. Grant, 8 Paige, 243; Chambers v. Hise, 2 D. & B. Eq. 375; Glover v. Payne, 19 Wend. 518; Dougherty v. McColgan, 6 G. & J. 275; Page v. Foster, 7 N. H. 362; Verner v. Winstanley, 2 Sch. & L. 393; Perry v. Meadowcraft, 4 Beav. 197; Williams v. Owen, 10 Sim. 368; Baker v. Thrasher, 4 Den. 493; Turnipseed v. Cunningham, 16 Ala. 501; Parish v. Gates, 29 Ala. 254.

[2] Sewell v. Price, 32 Ala. 97.

[3] Parish v. Gates, 29 Ala. 254.

after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that if the latter repaid to him by a specified day, the amount of the consideration-money expressed in the deed, then he would reconvey to him all the property therein mentioned; and binding himself to reconvey accordingly, is evidence of the highest character against the grantee. And although it may not be sufficient in itself to show that the parties intended the deed as a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the intention of the parties, or even renders it doubtful whether a mortgage or conditional sale was intended, it is enough to induce a court to declare it a mortgage. The inclination of courts always has been to lean against conditional sales: because an error which converts a conditional sale into a mortgage is not as injurious as one which changes a mortgage into a conditional sale; and this inclination is strongly manifested whenever the transaction had its origin in a proposition for a loan, or an intention to create a security for an obligation.[1]

§ 24. **A Covenant to repay the Money not absolutely necessary in determining the Nature of the Transaction.**—It is not necessary, in order to constitute a mortgage, or to make the grantor liable, that there should be a covenant on his part to repay the money

[1] Turnipseed v. Cunningham, 16 Ala. 159; McNiel v. Nosworthy, 39 Ala. 156; Trucks v. Lindsay, 18 Iowa, 504; Robinson v. Cropsey, 6 Paige, 480; Poindexter v. McCammon, 1 Dev. Eq. 373; Davis v. Stonestreet, 4 Ind. 101; Locke v. Palmer, 26 Ala. 312; Flagg v. Mann 2 Sum. 486; Parish v. Gates, 29 Ala. 254; Conway v. Alexander, 7 Cranch, 218; Secrest v. Turner, 2 J. J. Marsh. 471; Edrington v. Harper, 3 J. J. Marsh. 354; Crane v. Bonnell, 1 Green. Ch. 264; Robertson v. Campbell, 2 Call, 421; Russell v. Southard, 12 How. 139; Bank v. White, 1 Md. Ch. 536; Brant v. Robinson, 16 Mo. 129; Scott v. Henry, 13 Ark. 112; Williams v. Bishop, 15 Ill. 553.

which is to be paid to the grantee; and although the absence of such a covenant may be important evidence, it is not decisive of the question of mortgage or not; nor is it necessary that there should be any collateral or personal security for the debt secured by the mortgage.[1]

If a security for the money is intended, that security is a mortgage, though not bearing on its face the form of a mortgage; it is the essence of a mortgage that it is a security. And courts of law are adopting the equitable doctrine, that the debt is the principal, and the mortgage the incident; that it is not a conveyance, but a mere security;[2] which will be treated of hereafter.

The maxim is: once a mortgage, always a mortgage.[3]

[1] Robinson v. Farrelly, 16 Ala. 472; Smith v. People's Bank, 24 Me. 185; Hickox v. Lowe, 11 Cal. 187; Brant v. Robertson, 16 Mo. 129; Dougherty v. McColgan, 6 G. & J. 275; Russell v. Southard, 12 How. 139; Floyer v. Lavington, 1 P. Wms. 268; Lawley v. Hooper, 3 Atk. 271; Scott v. Fields, 7 Watts, 360; Flagg v. Mann, 2 Sumn. 533; Ancaster v. Mayer, 1 Bro. Ch. 464.

[2] Chick v. Willetts, 2 Kans. 384; Ladue v. Detroit R. R., 13 Mich. 340; Wilkins v. Wright, 6 McLean, 340; Mussina v. Bartlett, 8 Port. 277; Simms v. Shannon, 19 Md. 296; Brown v. Chase, Walk. (Mich.), 43; Ruggles v. Williams, 1 Head, 141; Bludworth v. Lake, 33 Cal. 265; Phil. &c. R. R. Co. v. Johnson, 54 Penn. 127; U. S. v. Athens Armory, 35 Ga. 344; Jackson v. Lodge, 36 Cal. 28; Fletcher v. Holmes, 32 Ind. 497; Williams v. Beard, 1 S. C. 309; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hildebrand, 46 Mo. 284; Mack v. Wetzlar, 39 Cal. 247; Pease v. Pilot, &c. Co., 49 Mo. 124; Lucking v. Wesson, 25 Mich. 443; Van Brunt v. Walkalee, 11 Mich. 177; Gay v. Bidwell, 7 Mich. 519; Darrow v. Kelly, 1 Dall. 142; Anderson v. Neff, 11 S. & R. 208; Lockett v. Hill, 1 Wood C. C. 552; Wilson v. Trump, 2 Cow. 196; Ryan v. Meserau, 11 Johns. 534; Bennett v. Taylor, 5 Cal. 502; McMillan v. Richards, 9 Cal. 365; Goodrich v. Ewer, 16 Id. 461; Boggs v. Hargrave, 16 Id. 559; Fogarty v. Sawyer, 17 Id. 580; Dutton v. Warshauer 21 Id. 609; Davis v. Anderson, 1 Ga. 176; Ryland v. Justices, &c., 10 Id. 65; Elfe v. Cole, 26 Id. 97; Seales v. Cashner, 2 Ga. Dec. 76; Hallv. Saville, 3 Iowa, 37; Caruthers v. Humprey, 12 Mich. 270; Bryan v. Butts, 27 Barb. 503; Thayer v. Cramer, 1 McCord Ch. 395.

[3] Clark v. Henry, 2 Cow. 324; Necomb v. Bonham, 1 Vern. 7; Vanderhaize v. Hugues, 2 Beasl. 244; Brown v. Gaffner, 28 Ill. 149; Shaver v. Woodward, 28 Id. 277.

§ 25. **How to Determine the Question of Mortgage or no Mortgage.**—If the question of mortgage depends upon written instruments, it is a question of law for the court; it is the province of the court to construe instruments where the meaning is to be collected from the instrument without the aid of extrinsic evidence.[1] And, to enable the court to determine it, the whole instrument should be set forth in the pleading—or, at least, those provisions which are relied on as giving it the character of a mortgage. The interpretation or construction of all contracts or instruments belongs exclusively to the courts; and the rule is the same, whether the agreement be oral or written.[2]

If, on written and parol evidence, it is a question for the jury, an admixture of parol with written evidence draws the whole to the jury, under proper instructions from the court.[3]

If the contract be oral, and there is a dispute as to its terms, that question is one of fact, to be tried by the jury or by the court;[4] but, after its terms are settled or agreed upon, the construction is for the court.[5] The construc-

[1] Fairbanks v. Bloomfield, 2 Duer, 349; Smith v. Jones, 13 Ired. 442; Wharf v. Howell, 5 Binn. 499; Carter v. Carter, 5 Tex. 93.

[2] Nash v. Drisco, 51 Me. 417; Drewe v. Towle, 30 N. H. 538; Watson v. Rowe, 16 Vt. 525; Smith v. Faulkner, 12 Eng. 251; McAvoy v. Long, 13 Ill. 147; Collins v. Banbury, 5 Ired. 118; Emery v. Owings, 6 Gill, 191; Monadnock R. R. Co. v. Feet, 52 N. H. 319; Williams v. Waters, 36 Ga. 454; Kane v. Hood, 13 Pick. 282; State v. Lefaire, 53 Mo. 470; Lippett v. Kell, 44 Vt. 516.

[3] Horne v. Puckett, 22 Tex. 201; Carter v. Carter, 5 Tex. 93; Wharf v. Howell, 5 Binn. 499; Jennings v. Sherwood, 8 Conn. 127; Sidewell v. Roberts, 1 Penn. 386; Welch v. Dusar, 3 Binn. 377; Dennison v. Wurtz, 7 S. & R. 372; Moore v. Miller, 4 Id. 279; Watson v. Blaine, 12 Id. 131; Overton v. Tracy, 14 Id. 311; Brown v. Campbell, 1 Id. 176; Etting v. U. S. Bank, 11 Wheat. 59; Goddard v. Pratt, 16 Pick. 412.

[4] Bradbury v. Marbury, 12 Ala. 520; Chapin v. Potter, 1 Hilt. 366; Globe Works v. Wright, 106 Mass. 216; Guptill v. Damon, 42 Me. 471: Ill. &c. v. Cassell, 17 Ill. 389.

[5] Fosterman v. Parker, 10 Ired. 471; Globe Works v. Wright, 106

fore they become due, executes a deed of property to A., upon condition to be void if B. saves A. harmless, and the deed and furniture was delivered to A. in presence of a witness, to whom the above transaction was made known, but B. continues in possession,[1] is a mortgage. And where a creditor, who was also surety of a debtor on the eve of stopping payment, received from him his whole stock in trade, accompanied by a bill of parcels, at the foot of which payment was receipted in the usual form, and at the same time the parties executed an indenture of two parts, declaring the conveyance to be intended as security for the debt due to the grantee and certain others, for which he stood liable as surety or indorser, with power to sell for payment of these debts, and a covenant to pay over the surplus to the debtor or his order on demand,— it was held that both the instruments, taken together, amounted to a mortgage, and that it was a valid transaction against other creditors, for whose debts no provision had been made, the jury having found that no fraud was actually intended.[2] An express contract for a "lien," providing that the contractors "shall retain a special lien on a boat, etc.," until certain notes are paid, when, by the terms of the contract, the party claiming the lien is not to retain possession until such notes are paid, will be construed as an equitable mortagage, and not a common-law lien.[3] So, where property was conveyed by an agent, who was only authorized to mortgage, with notice of which authority the grantee was held chargeable,—although the conveyance was in form absolute, it was held that it was only a mortgage.[4] So, where B. promises A. to buy machinery of C., and let A. have it to use at an agreed price per yard for cloth made by it at his fac-

[1] Ward v. Sumner, 5 Pick. 59.
[2] Bartels v. Harris, 4 Me. 146.
[3] Donald v. Hewitt, 33 Ala. 534.
[4] Coppage v. Barnett, 34 Miss. 621

tory, B. to furnish the raw cotton, and credit A. towards payment for the machinery with what the cloth sells for beyond that price and expenses, it is not at law a mortgage of the machinery by B. to A., because the title did not come from A. to B., and their agreement was not made at the time A. got his title; but, if an absolute debt from A. to B. existed, to be secured by a mortgage, and a memorandum at the bottom of the contract called the machinery collateral security for the money paid for it by B., and in the contract it was said to be security for the advance made, it may be deemed in equity a debt, though A. was said to be "at liberty" to pay the money advanced. Such contract may be deemed a mortgage of the machinery to B. in equity, and A. afterwards could not sell it legally to D. until he had paid B. all the debt; so that D., knowing the circumstances, or knowing enough to put him on inquiry, could not hold the machinery without paying B. the balance due. Such a contract, though a mortgage, need not be recorded in order to be valid between the parties to it, or those having notice of it. Possession by A. of such property, which had not been his before the mortgage, is not within the policy of the law, as to its being evidence of fraud, either if it is a mortgage or not. Nor is the machinery, under such a contract, in the control and disposition of A., so as to render it liable for his debts to others, like property of third persons, in the power and disposal of bankrupts, under the special provisions of bankrupt acts.[1]

§ 27. **When a Mortgage must be in writing.**—It is not absolutely necessary that a mortgage should be in writing. An unwritten mortgage is valid between the

[1] Almy v. Wilbur, 2 W. & M. 371.

parties; for, at common-law, a mortgage might be by word of mouth.[1]

This is on the principle that equity will consider that done which ought to have been done. If there is an agreement to give a mortgage, predicated upon the consideration of a debt contracted on the faith of the agreement, it will be held and enforced between the parties and their representatives as a mortgage.

A chattel mortgage must be filed, and consequently *in writing only*, where the rights of creditors and purchasers[2] are concerned; except where a statute requires an instrument duly acknowledged, and makes it valid or effectual only from date of record. Parol mortgages cannot be made in Pennsylvania,[3] and in many other States. In order to establish an equitable mortgage, there must be clear and unequivocal proof of the intention to create a mortgage, and of the sum which the mortgage is to secure; it can arise only from a specific agreement between the parties in interest, and a valuable consideration is essential.[4]

§ 28. **Acknowledgment of Mortgages.**—In some States, it is necessary that a chattel mortgage be properly acknowledged before some officer;[5] especially in Arkansas, California, Minnesota, Vermont, Virginia, and New Jersey.

The acknowledgment must be taken by some dis-

[1] Brooks v. Ruff, 37 Ala. 371; Flory v. Denney, 11 E. L. & Eq. 584; Morrow v. Turney, 35 Ala. 131; May v. Easton, 2 Porter, 422; Deshazzo v. Lewis, 5 S. & P. 94; Corter v. Bank of Ga., 24 Ala. 59; Bank v. Jones, 4 N. Y. 506.

[2] Bank of Rochester v. Jones, 4 N. Y. 497.

[3] Bowers v. Oyster, 3 Penn. 239.

[4] Cotten v. Blocker, 6 Fla. 1; Williams v. Stratton, 18 Miss. 418.

[5] Sage v. Browning, 51 Ill. 217; Herkelrath v. Stookey, 47 Ill. 21; Funk v. Staats, 24 Ill. 632; Gregg v. Sanford, 24 Ill. 17; Forest v. Tinkham, 29 Ill. 141; Henderson v. Morgan, 26 Ill. 431; Doughten v. Gray, 2 Stockt. 523; Wilson v. Traer, 20 Iowa, 231; Hamilton v. Mitchell, 6 Blackf. 131.

interested party; if taken by a party beneficially interested, it is void.[1]

In Virginia, in lieu of the acknowledgment provided by statute, it may be proved by the oaths of three witnesses, and recorded in the same manner as conveyances of real estate.[2]

A mortgage proved by two witnesses, and recorded, is void as to creditors.[3]

§ 29. **Requirements in various other States.**—In Maryland and New Hampshire, an affidavit is required, subscribed by both the parties, that the debt is honestly due, or it is void as to creditors.[4]

In California, a statement of the parties' occupation is required in the mortgage, merely for the purpose of identification of the parties; but this is held to be not one of the indispensable requisites to its validity.[5]

§ 30. **Sealing not Requisite.**—A chattel mortgage need not be under seal. There is this distinction between personal and real property: Personal property could always be transferred without the use of a deed; while real property cannot. A seal has never been held necessary to a bill of sale of personalty; while all conveyances of real property are sealed by the parties executing.[6] Nor is it necessary that the defeasance should be inserted in the body of the deed; it is sufficient if it is added underneath.[7]

[1] Wilson v. Traer, 20 Iowa, 231; Hammers v. Doyle, 61 Ill. 327.

[2] Hodgson v. Butts, 3 Cranch, 18.

[3] Moore v. Auditor, 3 H. & M. 232; Jennings v. Att'y-Genl., 4 H. & M. 424.

[4] Parker v. Morrison, 20 N. H. 280; Janvrin v. Fogg, 49 N. H. 340; Cockey v. Milne, 16 Md. 200.

[5] Ede v. Johnson, 15 Cal. 53.

[6] Despatch Line v. Bellamy Co., 12 N. H. 205; Milton v. Mosher, 7 Met. 244; Florey v. Denney, 7 Exchq. 581; Switzer v. Mead, 5 Mich. 107; Gerrey v. White, 47 Me. 504.

[7] Kent v. Albritain, 5 Miss. 317.

§ 31. **Mortgages or hypothecations by assignment of bills of lading.**—As we have heretofore treated of a class of instruments, in the nature of absolute or conditional conveyances of property, it is proper in this connection to treat of transactions in the nature of mortgages, which are intended to operate as such, without pursuing the statutory forms; namely, by an assignment or endorsement of a bill of lading. A bill of lading is an acknowledgment under the hands of a master of a vessel, or agent of a transportation company, that certain goods have been received, which they undertake to deliver to the person named therein. It is rather a memorandum, signed by the master of a vessel, or a duly authorized agent, acknowledging the receipt of goods of a merchant who has shipped them for delivery to his agent or correspondent at some distant place or foreign port. The merchant is called the consignor, and the party to whom they are to be delivered the consignee. A bill of lading is assignable in its nature, by delivery and endorsement, with a view to mortgage or sale. The legal interest in the property is immediately transferred from the owner to the assignee of the consignee; and, therefore, if goods consigned to A., generally, are *bona fide* mortgaged or sold by him whilst at sea, and the bill of lading is indorsed and delivered to the mortgagee or purchaser, together with the bill of sale, the vendee or mortgagee will hold them by virtue of the bill of sale, though no actual possession be delivered.

The bill of lading is the instrument which confers on the vendee or mortgagee the right to hold the goods, and not the bill of sale, which appears to relate more to a mortgage of the ship than to a pledge of the goods which it contains. The ship, however, with its tackle and furniture, is sometimes pledged by the master for the deliv-

ery of the articles enumerated in the bill of lading in good condition, at the place of discharge; in which case, a bill of sale of the ship is delivered to the consignor, as well as the bill of lading. By way of illustration, it may be remarked that it is a matter of constant occurrence, that, where a cargo of goods is consigned by a merchant abroad to another, the moment they are shipped, the former draws on the latter to the value of the cargo, and by the first post or ship he sends his advice, and encloses bill of lading,—the drafts and bill of lading, in most cases, arriving before the cargo; and then the merchant, who is the consignee, must decide what he will do. If he accepts the drafts, he becomes absolutely and unconditionally liable; if he refuses to accept them, he will disgrace his correspondent, and lose his custom. Yet to engage in the transaction and render himself responsible, without any security on the drawer of the drafts, would be a bold measure. The goods may be lost at sea, leaving the consignee without any security except his (perhaps uncertain) remedy against the consignor. To obtain security, he insures the cargo; and if the goods arrive, he can be repaid out of their sale—if not, then the underwriters are liable on the policy. This, however, cannot be effected unless the property be vested in him by the bill of lading; for otherwise, the policy would be void for want of interest.

Having then the bill of lading and the policy of insurance, he has a good security for the money advanced, inasmuch as both the bill of lading and the policy may be assigned either absolutely or by way of mortgage. If it were otherwise,—if the bill of lading did not transfer an irrevocable and uncountermandable right to receive the goods,—no man would be safe, in either buying or lending money upon goods at sea. A pledge of the bill of lading,

by which goods are delivered on payment of freight by the owner or past owner of the vessel, is also a pledge of the freight.[1] And as between the owner or vendor of goods, so circumstanced, and the assignee of the consignee or vendee, where the transaction is *bona fide*, the bill of lading transfers the property absolutely.[2]

And in all events, although, as between the vendor and vendee, the contract, where the delivery is at a distant place, is ambulatory; and in case of the insolvency of the vendee in the meantime, the vendor may stop the goods *in transitu;* because the latter rule is founded upon an equity arising between the original parties, and which the law has adopted, and does not affect the right of third persons who have trusted to the endorsement, and on the faith thereof advanced their money. And this is consistent with the broad general principle of law, that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it. Therefore, if a consignee of goods upon the sea assign the bills of lading to a third person, as a security by way of mortgage of them, the equitable as well as the legal right of such consignor is thereby instantly and completely divested; and the assignee has a complete title in law and equity, which cannot be effected by the consignor while the goods are *in transitu*.[3]

[1] Hogg v. Graham, 4 Taunt. 135.

[2] Lickbarrow v. Mason, 2 T. R. 63; Lempriere v. Pasley, 2 T. R. 485; Hallie v. Smith, 1 Bos. & P. 503; Mich. Cent. R. R. v. Phillips, 60 Ill. 190; Holbrook v. Wright, 24 Wend. 169; Grosvenor v. Phillips, 2 Hill, 147; Bank, &c. v. Jones, 4 N. Y. 497; Allen v. Williams, 12 Pick. 297; Gibson v. Stevens, 8 How. 384; Nat. Bank, &c. v. Crocker, 111 Mass. 163; First, &c. Bank v. Dearborn, 115 Mass. 219.

[3] Wiseman v. Vandeput, 2 Vern. 203; Newson v. Thornton, 6 East, 43; Cuming v. Brown, 505; Craven v. Ryder, 2 Marsh. 127; Coxe v. Harden, 1 Smith, 20. *See also Lickbarrow v. Mason; Smith Lead. Cases, pages* 1039, *et seq.*

§ 32. **Of the Effect of a Mortgage by an Agent or Factor.**—If the consignee be the agent or factor of the consignor, and the bill of lading be made to him generally, without noticing the relation of principal and agent, and the consignee makes a pledge of the goods while at sea, without notice, yet this will not divest the original right subsisting in the consignor to stop the goods *in transitu*. It being a rule of law that a factor cannot pledge the goods of his principal by the delivery of the goods themselves, it seems obviously inconsistent to say that the delivery of the bill of lading, which is a mere symbol of the goods, shall entitle the factor to an exemption from this rule. An agent or factor has authority to sell, but not to pledge, without a special authority.[1] And, therefore, a person who takes a pawn from a factor, takes it at his peril. The principal may maintain trover against the party with whom the goods are pledged, though the latter may be wholly ignorant that he has been dealing with a factor. The pawnee cannot complain of his having been deceived by the import of the bill of lading, since he can inquire for the letter of advice, which always accompanies the bill of lading to the consignee; which letter of advice will disclose the relation of principal and agent between the consignor and consignee, and show that the consignee holds as factor, and not as vendee. If, therefore, persons will neglect all precaution, and advance money on goods without enquiring whether the party has the right to dispose of them or not, they must bear the loss, if it turn out that he had no authority to do so.[2]

A factor cannot pledge the goods consigned to him for

[1] Graham v. Dyster, 2 Stark. 24; Shipley v. Kymer, 1 Maule & S. 484; Sweet v. Brown, 5 Pick. 178; Newson v. Thornton, 6 East, 43; Martin v. Coles, 1 M. & S. 139; Bentham v. Bensort, 1 Gow. 45.

[2] Smith v. Burridge, 4 Taunt. 684;

sale,—the rule being founded upon very plain reason, that he who gives the credit should be vigilant in ascertaining whether the party pledging has or has not authority to deal with the goods; and that knowledge might always be obtained from the bill of lading and letter of advice.[1]

The distinction, therefore, appears to be, that a bill of lading vests the absolute property of the goods in the consignee; but that, when the consignee is the agent or factor of the consignor, the bill of lading does not then vest the right to the goods in the consignee; for he neither pays, nor is liable to pay, a *bona fide* consideration for the same.[2]

A bill of lading is exactly like a bill of exchange; and the property it refers to passes by endorsement on it, but not by delivery of it without endorsement.

§ 33. **Other Instruments which are Mortgages.**— Leases, with conditions, are mortgages. Any condition in a lease, giving the lessor a lien upon the tenant's property as security for the rent, is a chattel mortgage. Thus, an absolute assignment of a lease, accompanied with a bond executed at the same time, reciting the assignment, and stating it to have been made to secure the payment of money to the assignee, and an agreement to reassign on payment of such money, is a mortgage.[3] So, a lease providing that the lessor is to have full title, with the privilege of taking full possession, at any and all times, of any and all the products of the farm in payment of the balance due on rent, is a chattel mortgage, and invalid if not recorded as required by law.[4] So, a

[1] Quieroz v. Trueman, 3 B. &c. 351.

[2] Coxe v. Harden, 4 East, 211.

[3] Jackson v. Green, 4 Johns. 186; Polhemus v. Trainor, 30 Cal. 685.

[4] Johnson v. Crofoot, 53 Barb. 574.

written agreement, properly executed, stipulating that the amount due for rent of land should be paid before the crops are removed, is a mortgage of the crops.[1]

§ 34. **Mortgages with Blanks for the Name of the Mortgagee.**—When a note and mortgage, fully executed, but with a blank in each for the name of the payee and mortgagee, are delivered to a party who is to procure a loan of money thereon from any person for the maker, this shows an intention that the party to whom the papers are intrusted for negotiation shall fill the blanks; and when filled by him, the instruments are valid, without a new execution and delivery.[2] The authority to insert the name of the lender may be implied. The delivery being made for the purpose of negotiating a loan, the papers would be worthless, in the hands of a third party, unless such implied assent is sustained. In the case of *Chauncy* v. *Arnold*, 24 N.Y. 330, the decision apparently contradicts this rule; but in that case the court decided that, as the blanks had never been filled, nor any evidence introduced or offer made to show the consent of the mortgagor to fill in the blanks,—that the mortgage was utterly void. So that the mortgagor's assent will be presumed, in all cases, when necessary to prevent injustice.

[1] Weed v. Stanley, 12 Fla. 166.

[2] Van Etta v. Evenson, 28 Wis. 33; Texira v. Evans, 1 Anst. 229; Wiley v. Moor, 17 S & R. 438; Smith v. Crooker, 5 Mass. 539; Duncan v. Hodges, 4 McCord, 239; Rich. &c. Co. v. Davis, 7 Blackf. 412; Wooley v. Constant, 4 Johns. 54; Knapp v. Maltby, 13 Wend. 587; In re Decker, 6 Cow. 59; In re Kerwin, 8 Id. 118; Com. Bank v. Kortright, 22 Wend. 364; Boardman v. Gore, 1 Stew. 517; Vliet v. Camp. 13 Wis. 198; Hudson v. Revett, 5 Bing. 388; West v. Stewart, 14 M. & W. 47.

# CHAPTER III.

## OF THE DESCRIPTION OF PROPERTY.

PROPERTY SUBJECT TO MORTGAGE.—DESCRIPTION OF THE PROPERTY.—WHAT THINGS ARE CAPABLE OF BEING MORTGAGED.—EVIDENCE TO IDENTIFY PROPERTY.—OF THE PROPERTY EMBRACED IN A MORTGAGE.—OF SCHEDULES.—DESCRIBING PROPERTY.—MORTGAGES THAT ARE VOID FOR UNCERTAINTY.—INTERMINGLING AND CONFUSION OF MORTGAGED PROPERTY.—OF THE MORTGAGEE'S RIGHT TO PROPERTY BY ACCESSION, AND WHAT PASSES THEREBY.—AFTER-ACQUIRED PROPERTY, EFFECT OF MORTGAGES CONVEYING.—WHAT AFTER-ACQUIRED PROPERTY WILL PASS BY A MORTGAGE.—ROLLING STOCK.

§ 35. Having ascertained what a chattel mortgage is, and what may constitute one, we must now learn what may be mortgaged, how the property mortgaged should be described, and what property is covered by a chattel mortgage.

§ 36. **As to what Things are Capable of being Mortgaged.**—Everything which may be considered property, whether by the technical language of the law denominated real or personal property, may be the subject of a mortgage; and generally, "*quod emptionem venditionemque recipit, etiam pignorationem recipere potest.*[1] At common-law, nothing can be mortgaged that does not belong to the mortgagor, at the time when the mortgage is made; but everything which is the subject of contract, or which may be assigned, is capable of being mortgaged.[2] Among the various kinds of property, in ad-

[1] Dig., lib. 9, § 1. [2] Neligh v. Mechinor, 3 Stockt. 539.

dition to those specified in the first chapter as chattels which are subject to mortgage, are: The profits arising out of a personal chattel.[1] The interest of a party to an executory contract before performance;[2] ships, vessels, etc.[3] Goods bought by a corporation, *ultra vires*, become their property, and they can sell or mortgage them.[4] Machinery in a factory.[5] If it be doubtful whether machinery in a building is, or is not covered by a mortgage, a court will prevent its removal until the question can be decided. The mortgagor should be a party to a suit raising such a question.[6] A growing crop of cotton, or any crop which is the result of annual planting.[7] Though grass growing is, in general, parcel of the realty, yet where it is owned by one who does not own the land, it is personal property, and may be mortgaged as such.[8] Growing wood and timber, where it is owned by one who has purchased the same, is personal property. A mortgage of such property takes effect, as a chattel mortgage, when the wood and timber is severed from the freehold.[9] In California, under a statute enacted in 1861, the furniture and fixtures of saloons are not subject to a mortgage.[10]

§ 37. **Property in the Custody of the Law.**—Property in the hands of an officer, under and by virtue of a writ of attachment or execution, is subject to mortgage by the owner. Where a mortgage is made while the property is so held under a levy against the actual

[1] Stewart v. Fry, 3 Ala. 573.
[2] Forman v. Proctor, 9 Brown, 124.
[3] Leland v. Medora, 2 W. & M. 92.
[4] Parish v. Wheeler, 22 N. Y. 494.
[5] Sturgis v. Warren, 11 Vt. 433.
[6] Hutchinson v. Johnson, 3 Halst. Ch. 40.
[7] Robinson v. Mauldin, 11 Ala. 977; *ante*, § 7, and cases cited.
[8] Smith v. Jenks, 1 Denio, 580; Jenks v. Smith, 1 N. Y, 90.
[9] Claflin v. Carpenter, 4 Met. 580; Douglass v. Shumway, 13 Gray, 498.
[10] Gassner v. Patterson, 23 Cal. 299.

owner of the property, and made to one who has notice of the levy to secure a prior debt, such mortgagee will be entitled to any surplus after satisfying the execution creditor,—the property passing to him subject to such lien.[1] A mortgage will be valid notwithstanding, at the time of its execution, a third person holds the property under the mortgagor, and has a special property therein.[2] Where the mortgagor dies after the attachment, and before an order of sale issues, or they are taken on execution, and his administrator receives the goods from the attaching officer, the mortgagee is entitled to the possession of the goods as security for the mortgage debt, and may maintain an action for them.[3] And where there is a judgment rendered in favor of the mortgagor, the mortgagee, as the equitable owner of the property, is entitled to the benefit.[4] If the property, though under attachment, is in the hands of the mortgagor at the time of the execution of the mortgage, and the mortgage is made in good faith to a person who merely knew that the property had once been levied on, and having no notice that the lien of the levy was still subsisting,—having been told by the mortgagor that the levy had been released,—he will hold it against the officer, and so will his assignee.[5] Or, where the mortgage is executed after an attachment has been issued, but before the levy has been made under the writ, the mortgage is valid; and the mortgagee's title will be sustained, if there are no other circumstances indicating fraud.[6] Where

[1] Appleton v. Bancroft, 10 Met. 231; Thompson v. Van Vechten, 6 Bosw. 373; Pindell v. Grooms, 18 B. Mon. 501.

[2] McCalla v. Bullock, 2 Bibb, 288.

[3] Parsons v. Merrill, 5 Met. 356.

[4] Appleton v. Bancroft, 10 Met. 231; Pindall v. Grooms, 18 B. Mon. 501.

[5] Carpenter v. Cummings, 40 N. H. 158.

[6] Kennard v. Adams, 11 B. Mon. 102.

the property is under seizure and pending the adjudication, a mortgage is made of the property and recorded, after which time a creditor who procures an attachment to be levied on the property will, in case the proceedings prior to the making of the mortgage result in the restoration of the property to the owner, take subject to such mortgage, and not in precedence of it. Thus, where a vessel and certain property on board of her belonging to the owner, was seized and libelled on the ground that the vessel was engaged in business unauthorized by the license, and afterwards a petition admitting the forfeiture and praying for its remission was filed by the owner of the goods in the United States Court, and due proceedings have been had, it was remitted by the proper authority. Prior to the remission, and while the goods were in the custody of the law, they were mortgaged, which mortgage was subsequently recorded. Subsequently to the remission and to the registry of the mortgage the defendant, who was a sheriff, levied an attachment on the goods. In action of replevin, it was held that the admission of the owner of the goods was not conclusive against himself, on the ground of forfeiture, but that he still had an interest in the property subject to the decision of the claim of the United States; and that this claim having been relinquished, the mortgage was valid as against a subsequent attaching creditor.[1]

§ 38. **Description of the Property.**—The description of property intended to be mortgaged, should be such as to distinguish it from other similar articles, or should contain some hint to direct the attention of such parties, who may read or examine the mortgage, to any source of information beyond the words of the parties to it; or

[1] Mitchell v. Cunningham, 29 Me. 376.

should be such as to enable third persons to identify the property, aided by inquiries, which the mortgage itself indicates and directs.[1] As between the mortgagor and mortgagee, a specific and particular description of the several articles mortgaged, by which to identify them from other like articles of the mortgagor, is not necessary.[2] Thus, a description, as follows: "Eight horses now in livery stable, No. 19 Silver street,[3] five freight wagons, and twenty five yoke of cattle, now in my possession."[4] A mortgage of "all the dry goods, boots and shoes, millinery goods, and gentlemen's furnishing goods, and stock in trade, now in the store occupied by" the mortgagor,[5]—"all and singular the stock, tools and chattels in and about the shop occupied by him,"[6] were held as sufficiently certain. So, where a boat is described as the "Steamer Phillips," instead of the steamboat Wm. Phillips, it is immaterial if the identity is clear, and a purchaser is not mislead as to its description.[7] Nor is it necessary, where machinery is mortgaged, together with the building in which it is situated, that it should be particularly described, if possession is delivered to the mortgagee.[8] Nor is it essential, to the validity of a mortgage, that it should contain a schedule or particular enumeration and value of the goods, if it be made without fraud, and sufficiently indicates the goods intended to be mortgaged,[9] where the description is imperfect or

[1] Elder v. Miller, 60 Me. 118; Chapin v. Crane, 40 Me. 561; Skowhegan Bank v. Farron, 46 Me. 293.

[2] Call v. Gray, 37 N. H. 428.

[3] Harding v. Colburn, 12 Met. 333; Morse v. Pike, 15 N. H. 529; Burdett v. Hunt, 25 Me. 419; Lawrence v. Evarts, 7 Ohio, S. 194; Wilson v. Merchants' Ins. Co., 4 Met. 506; Golden v. Cockrill, 1 Kans. 259.

[4] Smith v. McLean, 24 Iowa, 322.

[5] Conklin v. Shelly, 28 N. Y. 360; Gardner v. McEwen, 19 N. Y. 123.

[6] Harding v. Coburn, 12 Met. 333; Burdett v. Hunt, 25 Me. 419.

[7] Mattingly v. Darwin, 23 Ill. 618.

[8] Howe v. Keller, 27 Conn. 538.

[9] Brinley v. Spring, 7 Me. 241.

insufficient. If the mortgagee takes possession of the mortgaged property, that is sufficient; for that constitutes an identification and appropriation of the specific property to the mortgagees.[1]

§ 38 *a.* **What Things pass by the Mortgage of Goods and Chattels.**—If a debtor mortgage to a creditor all his "goods," or all his "chattels," by this do pass all his movable and immovable personal and real goods,—horses, and other beasts, plate, jewels, and household stuff, bows, weapons and such like, and his money, and his corn growing in the ground; but not the term or interest in his dwelling-house, nor his leasehold estate, unless there be some term or provision in the instrument manifesting an intention, on the part of the mortgagor, that his leasehold property should pass under the general description,[2] nor things which he hath in keeping for another, nor choses in action, nor things of pleasure, such as hounds, etc. If one grants to another all his utensils, "hereby will pass all his household stuff, but not his plate, jewels, or articles of trade." And "if two men have goods in common, and have other goods severally, and they give me all their goods,—by this grant is given all the goods they had in common, and likewise all the goods they had in severalty."[3] But if a schedule or inventory of the things purporting to be granted by the mortgage is annexed thereto, nothing will pass under the instrument except the things specified in the inventory,[4] or comprehended under some general description contained therein.[5] Evidence of surrounding circumstances is admissible to show what was intended to be conveyed,

[1] Morrow v. Reed, 30 Wis. 81.
[2] Harrison v. Blackburn, 17 C. B. N. S. 678.
[3] Shep. Touch. 98.
[4] Wood v. Rowcliffe, 6 Exchq. 407.
[5] Cort v. Segar, 3 H. & N. 373.

and what is and is not parcel of the subject-matter of the mortgage, and intended to pass thereby.[1] In order to transfer the right of property in goods or chattels, the chattel intended to be conveyed must be in existence, and be ascertained and identified at the time of the execution of the instrument. If I grant a man twenty books to be taken out of my library, no right of property in any particular books passes to the grantee. But if I have a set of U. S. Statutes, among other books, I can grant them, and the grant is good; or, if I have two or more books that can be distinguished from the rest, and I grant one or more of them, the grant is good for this, that it is certain what thing is granted.[2] A grant of fifty bushels of corn, twenty hogsheads of ale, or a dozen baskets of fruit, amounts only to a covenant to deliver goods answering the description given in the grant, and does not operate as an immediate transfer of any particular parcel of corn or quantity of ale or fruit, unless the corn was measured, the ale put into hogsheads, the fruit into baskets, and set apart so as to be ascertained and identified at the time of the execution of the grant.

§ 39. **Parol Evidence to Identify Property.**— Mortgages of chattels are often made on a part of a lot of property, or a specific number of articles; as, upon one thousand feet of lumber, or ten mowing machines, being in the possession of the mortgagor, in a certain place mentioned in the mortgage. In cases of this kind questions constantly arise between creditors and the mortgagees, as to which portion of the property is, or was, intended to

[1] McDonald v. Longbottom, 28 L. J. Q. B. 293.

[2] Lunn v. Thornton, I C. B. 379; Gale v. Burnell, 7 Q. B. 863; Barr v. Gibson, 3 M. & W. 390; Robinson v. McDonald, 5 M. & S. 228; Morgan's Add. on Contracts, 363.

be covered by the mortgage; as, where the description of the property was of 11,000 feet of lumber in the shop of the mortgagor at the time of its execution, it was shown that there was no such amount of lumber in his shop at the time, but that the lumber had been purchased, which the mortgage was intended to cover. The evidence in the case having created a latent ambiguity, it is open to parol explanation. It was proved that the mortgagor did not have more than 2,000 feet of lumber in his shop, but it was shown that he had purchased 11,000 feet. Therefore, parol evidence was admissible to show what lumber was intended, and where it was situated.[1]

Whenever it becomes necessary to identify the property described in a mortgage from other property of a similar kind, or to show what was intended to be conveyed, extrinsic evidence is admissible.[2]

So, where there is a mortgage of all and singular, the stock, tools, and chattels belonging to "the mortga-

[1] Galen v. Brown, 22 N. Y. 37.

[2] Rugg v. Hale, 40 Vt. 138; Rowley v. Bartholmew, 37 Iowa, 374; Hughes v. Sandal, 25 Tex. 162; Sargeant v. Solberg, 22 Wis. 132; Bell v. Prewitt, 62 Ill. 361; Brooks v. Aldrich, 17 N. H. 443; Harding v. Coburn, 12 Met. 333; M. & M. R. R. Co. v. M. & W. R. R. Co., 20 Wis. 174; Meyers v. Ladd, 26 Ill. 415; Hancock v. Watson, 18 Cal. 137; Dodge v. Potter, 18 Barb. 193; Pettis v. Kellogg, 7 Cush. 456; Lawrence v. Evarts, 7 Ohio, S. 194; Barry v. Bennett, 7 Met. 354; Longchamps v. Fawcett, Peak, 71; Quantrell v. Wright, Bun. 274; Doe v. Burt, 1 T. R. 701; Doe v. Alexander, 3 Taunt. 147; Hodges v. Horsfall, 1 R. & M. 116; Andrew v. Andrew, 8 D. G. M. & G. 350; Sargeant v. Adams, 3 Gray, 81; Woods v. Sawin, 4 Gray, 322; Hardy v. Mathews, 38 Mo. 121; Webster v. Blount, 39 Mo. 500; Hatch v. Hatch, 2 Hayes, 327; Abbott v. Abbott, 51 Me. 575; Wing v. Gray, 36 Vt. 261; Bell v. Woodward, 46 N. H. 315; Lofter v. Heath, 2 Hay. 347; Middleton v. Perry, 2 Bay. 539; Miller v. Travers, 8 Bing. 244; Stover v. Freeman, 10 Mass. 435; Waterman v. Johnson, 13 Pick. 261; Dillon v. Harris, 4 Bligh. N. S 343; Parks v. Ins. Co., 5 Pick. 34; Coit v. Starkweather, 8 Conn. 289; Blake v. Doherty, 5 Wheat. 359; Storer v. Ins. Co., 45 Me. 175; Midlothian, &c. Co. v. Finney, 18 Gratt. 304; McDonald v. Longbottom, 28 L. J. & B. 293.

gor," in and about the shop occupied by him, it may be shown by parol evidence, what articles were in and about the shop when the mortgage was made.[1] So, where a mortgage is made of ten horses in the mortgagor's possession, it is not void for uncertainty; for the mortgagees may show that the horses taken by him were those actually mortgaged.[2] So, where A. mortgaged to B., among other things, "one ton of wire," it was held, in an action of trover by B. against D., to recover the value of the wire, that B. might show, by parol evidence, facts and circumstances to prove that A. and B. did not mean by the mortgage a precise ton by weight, but a certain mass of wire stored in a certain place, and denominated a ton.[3] So, where a mortgage was made of "all the staves I have in M., the same I had of F.," and it appeared the mortgagor had no staves in M., but had a quantity in the adjoining town, near the boundary of M., which he had obtained from F., it was held that the first part of the description might be rejected as false; and that the remainder was sufficient to pass the property, it being a matter of identification.[4] Where the description of property in a mortgage can be rendered sufficiently definite, by evidence of the facts as to property mentioned, such mortgage will convey whatever in fact answers to the description.[5]

Where ashes in an ashery were among the articles enumerated in such an instrument, but the quantity was not specified, but simply described as the ashes then in the ashery, in the possession of the purchaser, and it does not appear that the seller or mortgagor had any other than the ashes in question, or that there was

[1] Harding v. Coburn, 12 Met. 333; Lawrence v. Evarts, 7 Ohio S. 194.
[2] Eddy v. Caldwell, 7 Minn. 225.
[3] Barry v. Bennett, 7 Met. 374.
[4] Pettis v. Kellogg, 7 Cush. 456.
[5] Conklin v. Shelly, 28 N. Y. 360.

more than one ashery in his possession.[1] The terms of a mortgage cannot be controlled, nor fraud in its execution shown, by the understanding of a witness as to what property was covered by it; especially where he does not state when he had this understanding.[2]

§ 40. **What Property is Covered by a Mortgage.**—It becomes an important question, in many cases arising between the creditors of a mortgagor and the mortgagee, as to what specific articles, or portion of their debtor's property, is covered by a mortgage. Where a mortgage is made of a specific number of articles of a particular kind in a house, in which there are other like articles of the mortgagor, the mortgagee has the right of selection, where there is no selection made at the time of its execution.[3] So, where there is a mortgage of different kinds of property specified,—as to some kinds a greater number of articles than the mortgagor owned, and as to others a less number,—without describing the particular articles otherwise than by their general class or number, and there is no selection or delivery made; in a case of this kind, where more articles than the mortgagor has are specified, the conveyance is good as to those which he actually has in his possession.[4] Where a specific number of articles are mentioned of a certain kind, in and about a shop, and also all the other property there situate, the specific enumeration does not prevent the passing of other articles of the same kind, which are in and about the shop.[5] A mortgage of a machine-shop includes all fixtures, as such, and the mortgagor cannot remove them, to the injury of the mort-

[1] Dunning v. Stearns, 9 Barb. 630.
[2] Hurd v. Gallaher, 14 Iowa, 374.
[3] Call v. Gray, 37 N. H. 428.
[4] Croswell v. Allis, 25 Conn. 311.
[5] Harding v. Coburn, 12 Met. 333.

gagee.[1] So a sign, or statue, used in front of a store, is included in a mortgage of the furniture and signs.[2] But, under a mortgage of "all the goods of different varieties and kinds in the store of," etc., an iron safe, not for sale, but for private use, is not included;[3] nor do the notes and debts due a firm pass under the words, "all the stock in trade of any nature or kind whatever."[4] But where goods are mortgaged, and described as being in a certain store, the mortgage covers the goods, though they are subsequently moved to another store.[5] By a mortgage of the following property, viz.: "One bay mare; one cow; one chaise and harness; one sleigh, robes, and harness; one saddle and bridle; all the farming tools and other personal property in and about the premises; all the furniture and all other articles,"—a family carriage, belonging to the mortgagor, passes, if on the premises at the time the mortgage is given; and evidence that, immediately after it was given, the mortgagor pointed out the carriage to the mortgagee as being included therein, is sufficient to identify it.[6] So, under a mortgage conveying a list of property used in and about a hotel, "together with all other goods, effects, furniture, chattels, property, and things of every name and nature now used, attached, situate, and being in and about the hotel," is sufficiently broad to embrace a sail-boat which is on the water near the hotel, and used in connection with it, although other sail-boats are particularly mentioned in the description of the property.[7] Where a description of property in a mortgage, after enumerating certain articles

[1] Hoskins v. Woodward, 45 Penn. 42.

[2] Curtis v. Martz, 14 Mich. 506.

[3] Curtis v. Phillips, 5 Mich. 112.

[4] Kemp v. Carnley, 3 Duer, 1.

[5] Wheelden v. Wilson, 44 Me. 1; Brown v. Thompson, 59 Me. 372.

[6] Goulding v. Swett, 13 Gray, 517.

[7] Veazie v. Somerby, 5 Allen, 280.

specifically, concludes as follows: "Carpets, bedding, bed-room furniture, and other personal property in and about said premises, excepting herefrom such personal property as is exempt by law," specifying it, and excepting other household goods and furniture, to the amount of $250, at the time in said house, the property specifically enumerated is unconditionally mortgaged; and the exception applies to the property under the general description, where that is shown to be the intention.[1] A mortgage may be valid, although the property is described therein "as said store," "and all the goods, wares, and merchandise in and about the same," though the store is standing on the lot of another.[2]

A mortgagé of all personal property whatever, will pass choses in action.[3] But, where the property is described as "all the stock in trade, of any kind whatever," notes and debts due to a firm will not pass in a mortgage.[4]

§ 41. **Description of Property as per Schedule.**— Where the property is described, as in a schedule to be annexed, it covers all that can be identified, though no schedule is ever annexed to the mortgage;[5] as it operates as a mortgage of all the property on the premises at the time of its execution;[6] or, if the schedule is annexed to the mortgage, all the property of which a schedule was made.[7] A schedule annexed to a mortgage, and referred to in it, is a part of that instrument, and both papers

[1] Giddy v. Uhl, 27 Mich. 94.
[2] Wolfe v. Door, 24 Me. 104.
[3] Sherman v. Dodge, 28 Vt. 126.
[4] Kemp v. Carnley, 3 Duer, 1.
[5] Winslow v. Merchants Ins. Co., 4 Met. 306.
[6] Van Heusen v. Radcliff, 17 N. Y. 580.
[7] Partridge v. White, 59 Me. 564.

must be construed together;[1] and where it is attached to such instrument the presumption is, that it was annexed before the execution of the mortgage.[2] Where a mortgage is made of "the property described in the annexed schedule, marked A., except such articles as are by law exempt from levy and sale under execution," all the property, except that which falls within the exception, is covered by it.[3] And where the property is described by reference to a schedule annexed to another mortgage on file, executed by the same mortgagor, although in the description of the property there is no reference as to the prior mortgage being on file, such description is sufficient. As between the parties, any description is sufficient; as to third persons, the place to ascertain whether there are any prior mortgages, is from the records, or files: so that, if it simply describes the property as being the same conveyed in a prior mortgage, and if there is no prior mortgage on record, or on the files, there will be no notice to third parties; if there is, it is notice to all the world.[4]

§ 42. **Of Mortgages that are Void for uncertainty in the Description of the Property intended to be Conveyed.**—A mortgage of personal property, like that of real estate, may be void for uncertainty in the description.[5] The description of the property may be so vague that it is impossible to identify the property, or give notice to creditors and others, of the property which is to be incumbered. In such cases, the mortgage will

[1] Edgell v. Hart, 9 N.Y. 216; Roberts v. Ins. Co., 3 Hill, 501; Hills v. Miller, 3 Paige, 254; Bartels v. Harris, 4 Me. 146.

[2] Belknap v. Wendell, 21 N. H. 175.

[3] Giddy v. Uhl, 27 Mich. 94; Newell v. Warren, 44 Barb. 258.

[4] Newman v. Tymeson, 13 Wis. 172.

[5] Golden v. Cockrill, 1 Kas. 259.

be void as to others than the parties. Where a statute requires that a mortgage shall contain such efficient and full description of the property, that the same may be thereby readily and easily known and distinguished, a mortgage of a horse, describing it simply as "one sorrel horse," is, as to others than the parties to it, void for want of sufficient description.[1] So, a description as follows: "One hundred and twenty-four head of mules, and one pair of claybank horses, now in the Territory of Kansas;"[2] also, a description of oxen, as "three yoke of oxen," is insufficient to enable any one to identify them, or to distinguish them from others.[3] So, where a mortgage is of property, and there is a larger quantity in the possession of the mortgagor than is specified in the description, and no particular description of the articles otherwise than by their general class, or number,—as, "ten new buggies,"—nor any selection or delivery of the articles, nor specification as to which ten are intended out of a large lot of buggies then on hand, such mortgage will be ineffectual to pass any title to any particular property, or to any interest to the property on hand.[4]

§ 43. **Of the Intermingling or Confusion of Mortgaged Property with other of a similar Kind.** —It is a rule of law, that, where a man mixes his own property with that of another, and thereby makes confusion, the whole mass belongs to him whose rights have been invaded, and the owner loses his right to the whole.[5]

[1] Montgomery v. Wight, 8 Mich. 143.
[2] Golden v. Cockrill, 1 Kas, 259.
[3] McCord v. Cooper, 30 Ind. 9.
[4] Croswell v. Allis, 25 Conn. 311; Blakely v. Patrick, 67 N. C. 40.
[5] The Odin Rob Admr, 208; Blackenridge v. Holland, 2 Blackf. 377, Willard v. Rice, 11 Met. 493; Pratt v. Bryant, 20 Vt. 333; Haseltine v. Stockwell, 30 Me. 237; Inglebright v. Hammond, 19 Ohio, 337; Robinson v. Holt, 39 N. H. 557; Beach v. Schmultze, 20 Ill. 185;

But this rule is carried no farther than necessity requires; and if the goods can be readily distinguished and separated, then no change of property takes place.[1] Or, if the property could not be distinguished,—if the property of each is of the same description,—so that an equal quantity of what he before possessed (as barrels of pork), if restored to each from the common mass, would place him substantially in *statu quo*.

If a mortgagor of goods, who is entrusted with the possession, intermix them, purposely or through want of proper care, with his own goods, so that they cannot be distinguished, and consign them for sale to a third person, who sells them, the mortgagee is entitled to recover of the consignee or purchaser the value of the whole; in the absence of evidence by which the mortgaged property can be distinguished, they become accessorial to the mortgaged property, and subject to the lien and operation of the mortgage.[2] But where the property is intermixed, by the permissive act of the mortgagee and that of the former owner, so as to prevent separation or identification, the rights of third parties ought not to be affected thereby.[3] But where a mortgagee is compelled to take or recover possession of the property, and in good faith mixes it with other like property, and makes sales from the whole stock as purchasers may be found for the same,

Seavy v. Dearborn, 19 N. H. 351; Hart v. Ten Eyck, 2 Johns. Ch. 62; Wilson v. Nason, 4 Bosw. 155; Brakely v. Tuttle, 3 W. Va. 86; Jenkins v. Steanka, 19 Wis. 139; Root v. Bonnema, 22 Wis. 539; Wingate v. Smith, 20 Me. 287; Magee v. Siggerson, 4 Blackf. 120; Martin v. Porter, 5 M. & W. 352; Wild v. Hold, 9 Id. 672; Brown v. Saxe, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505; Rightmyer v. Raymond, 12 Wend. 51; Ryder v. Hatheway, 12 Pick. 298.

[1] Colwill v. Reeves, 2 Camp. 575; Holbrook v. Hyde, 1 Vt. 286; Pratt v. Bryant, 20 Vt. 333; Frost v. Willard, 9 Barb. 440.

[2] Dunning v. Stearns, 9 Barb. 630; Willard v. Rice, 11 Me. 493; Adams v. Wildes, 107 Mass. 123.

[3] Hamilton v. Rogers, 8 Md. 301.

but keeping separate accounts of the proceeds, so that the money realized from the sale of the mortgaged property can be readily ascertained, there is no such confusion of goods as will make him liable for, or chargeable with, the value of the mortgaged property at the time of the mixture.[1] So, where a mortgagor mixed a lot of property on hand at the time of the execution of the mortgage with that of the same kind subsequently acquired, the mortgagee cannot claim all the property in such case, but only such as was in existence at the time he acquires his rights; and as to all acquired after that time, he must share in with the mortgagor's creditors, in the ratio which the quantity in the possession of the mortgagor at the time bears to that obtained afterwards. This is on the ground that after-acquired property is not included in a mortgage.[2]

§ 44. **Things not yet in Existence which may Pass under a Mortgage.**—In relation to things not in existence at the time of the execution of a mortgage, there is a distinction made by the civil law between various classes of property and things which are said to have a potential existence,—that is, things which are the natural product, or expected increase, of something already belonging to the mortgagor; as a crop of hay to be grown on a field; the wool to be clipped from his sheep at a future time, or the milk that his cows will yield in the coming month, and the product of a dairy. Upon such things the mortgage will take effect as an incumbrance upon the property as soon as it comes into existence; and the rights of the mortgagee will be protected at law, as well as in equity; it being a rule of the

[1] Armstrong v. McAlpine, 18 Ohio S. 184.

[2] Mowry v. White, 21 Wis. 417.

civil law, that, while a mortgage is restrained to certain things, the lien of the mortgage will be extended to all such as shall arise or proceed from the thing mortgaged. Thus, the fruits which grow on land mortgaged are subject to the mortgage while they continue unseparated from the land. The right to growing crops and the growing produce of the soil, not sown or planted at the time of making the mortgage, may pass thereby. The land is the mother and root of all fruits: therefore he that hath the land, may grant all fruits that may arise upon it after; and the property will pass as soon as the fruits are extant. A person may grant all the wool that he shall have in a year from his sheep, but a person cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually or potentially. When a stud of horses, a herd of cattle, or a flock of sheep are mortgaged, the foals, the lambs, and other animals which they bring forth, and which augment their number, are likewise bound for the creditor's security; and if the whole herd, or flock, be entirely changed, the heads which have renewed it are bound in the same manner as the old stock. This rule of the civil law has been adopted, and, by universal acknowledgment, has become a part of the law of England and the United States.[1]

[1] Forman v. Proctor, 9 B. Mon. 124; Evans v. Merriken, 6 G. & J. 39; Fowler v. Merrill, 11 How. 375; Backhouse v. Jett, 1 Brock. 511; Tyson v. Pympson, 2 Hay. 142; Carr v. Allatt, 3 H. & N. 964; Grantham v. Hawley, Hob. 132; Wood's Case, 1 Leon. 42; Robinson v. McDonald, 5 M. & S. 228; Conderman v. Smith, 41 Barb. 404; Ellett v. Butt, 1 Wood C. C. R. 214; Floyd v. Morrow, 26 Ala. 353; Stamps v. Gilman, 43 Miss. 456; Butt v. Ellet, 19 Wall. 544; Jones v. Chamberlain, 5 Heisk. 210; Adams v. Tanner, 5 Ala. 740; Westbrook v. Eager, 16 N. J. L. 81; Cook v. Steel, 42 Tex. 53; Robinson v. Ezzell, 72 N. C. 231; Duke v. Strickland, 43 Ind. 494.

§ 45. **Of the Mortgagee's Right to Property by Accession.**—The ownership of a thing, whether real or personal, movable or immovable, carries with it all the thing produces, and to all that becomes united to it, either naturally or artificially. This is the right of accession. The right to property by accession may occur when material belonging to several persons are united by labor into a single article. The ownership of the article so formed, is in the party to whom the principal part of the material belongs.[1] So that, when a wagon, or any species of chattel property, is mortgaged, and subsequently, through accident or otherwise, it becomes necessary to change it, or repair it, and although the repairs may amount to more than the original value of the thing, the right of property in the owner not being changed, it still continues subject to the mortgage.[2]

Where a manufacturer or a mechanic makes a mortgage of articles in process of completion, and afterwards adds labor and material to them, the articles, when completed, will be covered by the mortgage; and the mortgagee will hold them, as against any of the mortgagor's creditors, if they remain substantially the same as when mortgaged;[3] as, where there is a mortgage of a gun, which is subsequently broken by accident and repaired, the mortgagee will hold it, although the lock and stock are changed, provided it is capable of identification,[4] or if

[1] Pulcifer v. Page, 32 Me. 404; Merritt v. Johnson, 7 Johns. 473; Stevens v. Briggs, 5 Pick. 177; Gregory v. Stryker, 2 Denio, 628; Pierce v. Schenck, 3 Hill, 28; Barker v. Roberts, 8 Me. 101; Rightmeyer v. Raymond, 12 Wend. 51.

[2] Southworth v. Isham, 3 Sand. 448; Comins v. Newton, 10 Allen, 518; Crosby v. Baker, 6 Allen, 295; Putnam v. Cushing, 10 Gray, 334; Harding v. Coburn, 12 Met. 333; Perry v. Pettingill, 33 N. H. 433.

[3] Harding v. Coburn, 12 Met. 333; Perry v. Pettengill, 33 N. H. 433; Putnam v. Cushing, 10 Gray, 334; Crosby v. Baker, 6 Allen, 295.

[4] Comins v. Newton, 10 Allen, 518.

the mortgage covers materials out of which the articles are furnished, the mortgagee is entitled to the additional value.[1] So a mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor.[2] Plants and shrubs, the growth of cuttings from plants and shrubs, mortgaged pass to the mortgagee by accession.[3] So, where there is a mortgage of property belonging to a business establishment, and the mortgagor disposes of part of the property, converts it into money, and purchases other articles with the avails, the title to these will not, by mere operation of law, vest in the mortgagee. But if they are procured for the simple purpose of replenishing the establishment, by supplying the place of lost or worn-out articles belonging to it, and they become incorporated with and attached to it, or are so commingled with the old as to be not readily distinguished, they follow its title by right of accession;[4] as, where the mortgagor of a vessel removes old sails which are worn out, and replaces them with new ones, and the mortgagee subsequently takes possession of the property, the new sails pass with the vessel.[5] Where cucumbers in bulk and in salt were mortgaged, and subsequently "greened," put into bottles and vinegar, they are not so substantially changed or intermingled with the property not included in the mortgage as to pass to the owner of the bottles, or the party preparing them for market, but are still covered by the lien of the mortgage.[6] Where property has been wrongfully converted into another species of property, still, if its identity can be traced,

[1] Jenckes v. Goff, 1 R. I. 511; Southworth v. Isham, 3 Sand. 448.
[2] Putnam v. Cushing, 10 Gray, 334.
[3] Bryant v. Pennell, 16 Me. 108.
[4] Holly v. Brown, 14 Conn. 255; Fowler v. Hoffman, 31 Mich. 215.
[5] Southworth v. Isham, 3 Sand. 448.
[6] Crosby v. Baker, 6 Allen, 295.

it will, in its new form, be liable to all the rights of the original owner and those claiming under him.[1]

§ 46. **Property termed "After-acquired"—Whether bound by a Chattel Mortgage.**—In the preceding sections, in treating of the mortgagee's title to property by right of accession, the author has laid down the only principles by which after-acquired property can be withdrawn from the reach of general creditors. There have been of late several conflicting decisions in regard to the rights of parties under a mortgage, as to property substituted by the mortgagor for that originally encumbered by him as security for the mortgage debt. While it may seem somewhat difficult to harmonize such adjudications, they will not, upon critical examination, be found to be utterly antagonistic. It is a well settled principle of law, that nothing can be mortgaged which is not in existence, *in esse*, and which does not belong to the mortgagor at the time of the execution of the mortgage: "*qui non habet, ille non dat;*" and this being the common-law rule, it becomes necessary to ascertain how far courts have followed and adopted the rule, and where not. At law, a mortgage of property, not then in existence, or not belonging to the mortgagor, but to be acquired *in futuro*, is void as to that property.[2]—

[1] Sillsbury v. McCoon, 3 N. Y. 379; Williams v. McClanahan, 3 Met. Ky. 420.

[2] Henshaw v. Bank, 10 Gray, 571; Bellows v. Wells, 36 Vt. 599; Gale v. Burnell, 7 Q. B. 850; Head v. Goodwin, 37 Me. 181; Pierce v. Emery, 32 N. H. 484; Otis v. Sill, 8 Barb. 102; Winslow v. Merchants' Ins. Co., 4 Met. 306; Hamilton v. Rogers, 8 Md. 301; Wilson v. Wilson, 37 Md. 1; Pettis v. Kellogg, 7 Cush. 456; Barnard v. Eaton, 2 Cush. 294; Codman v. Needham, 3 Cush. 306; Chapin v. Crane, 40 Me. 56; Low v. Pew, 108 Mass. 347; Carpenter v. Simmons, 1 Rob. (N. Y.) 360; Yates v. Olmsted, 65 Barb. 43; Mitnacht v. Kelly, 3 Abb. N. Y. App. 301; Single v. Phelps, 20 Wis. 398; Farmers, &c. Co. v. Com. Bank, 11 Wis. 207; Chisholm v. Chittenden, 45 Ga. 213; Lunn

Under such a mortgage, the mortgagee obtains no valid title by that instrument to the property purchased, after giving the mortgage.[1] Thus, a mortgage professing to sell and convey to the mortgagees, not only the scythes, iron, steel and coal then owned by the mortgagors, but also "all scythes, iron, steel and coal, which may be purchased in lieu of the aforesaid property," is, as to the property which may be purchased, void for uncertainty.[2] If such a grant is valid in equity, it is only as a contract to assign when the property shall be acquired; and, if it is enforced in equity, it can only be enforced as a right under a contract, and not as a trust attached to the property. Where a mortgage upon personal property, to be subsequently acquired, does not specify any particular property, but mentions generally all property of that description which may be subsequently purchased by the mortgagor, the mortgage does not become a specific lien on the subsequently-acquired property, from the time the same is purchased, as against the mortgagor and persons claiming under him. Such mortgage can only be regarded as a mere contract to give a further mortgage on the subsequently-acquired property, binding upon the mort-

v. Thornton, 1 C. B. 385; Powers v. Freeman, 2 Lans. 127; Titus v. Maybee, 25 Ill. 247; Levy v. Welsh, 2 Edw. Ch. 438; Jones v. Richardson, 10 Met. 481; Moody v. Wright, 13 Met. 7; Spies v. Boyd, 1 E. D. Smith, 445; Meyer v. Gorham, 5 Cal. 322; Tapfield v. Hillman, 64 E. C. L. 243; Congreve v. Everts, 10 Exchq. 307; Freeman v. Rawson, 5 Ohio S. 1; Harman v. Abbey, 7 Ohio S. 218; Davis v. Ransom, 18 Ill. 396; Rose v. Beavan, 10 Md. 166; Chynoweth v. Tenney, 10 Wis. 379; Hunt v. Bullock, 23 Ill. 320; Hamlin v. Rogers, 40 Me. 561; Anderson v. Howard, 49 Ga. 313; Yelverton v. Yelverton, Cro. Eliz. 401; Mogg v. Baker, 3 M. & W. 195; Gale v. Barnewal, 7 A. & E. N. S. 850.

[1] Lunn v. Thornton, 1 C. B. 385; Jones v. Richardson, 10 Met. 481; Rhines v. Phelps, 8 Ill. 455; Barnard v. Eaton, 2 Cush. 294; Pettis v. Kellog, 7 Id. 471; Goodenow v. Dunn, 21 Me. 95; Ranlett v. Blodgett, 19 N. H. 295; and cases cited in note 1, *supra*.

[2] Otis v. Sill, 8 Barb. 102; Winslow v. Ins. Co., 4 Met. 306.

gagor personally; and the only remedy of the mortgagee, on such contract, is by action as a general creditor to recover damages for a breach thereof. The legal title to such subsequently-acquired property is in the mortgagor, and may be seized by a judgment creditor of the mortgagor and sold; and whatever right or interest the mortgagor has therein, will pass to the purchaser.[1] Where a mortgagor purchases a stock of goods, and forms a copartnership with a third person, who furnishes goods of equal value, and a regular business is conducted and sales made in the usual course of trade, the stock is replenished and deficiencies supplied, the stock bought from the proceeds of the mortgaged property is not liable to the mortgagee's claim.[2] Such a provision in a mortgage, or one allowing the substitution of other property, will not avoid the mortgage as to the property actually in existence at the time. As to such property, there is no question as to its effect; for it is such as the mortgagor has the right to convey;[3] and such after-acquired property is liable to be taken on execution, or attachment, or made the subject of a subsequent mortgage to creditors, or sold by the mortgagor, and a good title conveyed.[4]

And courts of equity, in adopting many of the rules and principles of the civil law, have gone beyond the common law in regard to after-acquired property,

[1] Otis v. Sill, 8 Barb. 102.

[2] Anderson v. Howard, 49 Ga. 313.

[3] Mowry v. White, 21 Wis. 417; Gardner v. McEwen, 19 N. Y. 123; Brown v. Thompson, 59 Me. 372; Moody v. Wright, 13 Met. 17; Otis v. Sill, 8 Barb. 102; Levy v. Welsh, 2 Edw. Ch. 438; Codman v. Freeman, 3 Cush. 306; Van Heusen v. Radcliff, 17 N. Y. 580; Vorhiss v. Langsdoff, 35 Miss. 451; Goodrich v. Williams, 50 Ga. 425.

[4] Single v. Phelps, 20 Wis. 399; Comstock v. Scales, 7 Wis. 159; Chynoweth v. Tenney, 10 Id. 397; Farmers, &c. v. Com. Bank, 11 Wis. 207; Swift v. Hall, 23 Id. 532; Mowry v. White, 21 Id. 417; Sheppardson v. Cary, 29 Id. 34. Cases *supra*, notes 1, 2 and 3.

especially real estate; and by a forced rule of construction the principles were held, to some extent applicable to mortgages, not of personal property, but what has, by force of circumstances, become known as chattels. The rule of the common-law having been stated, we will now examine the civil-law rule, as adopted by courts of chancery: "Whenever parties, by their contract, intended to create a positive lien or charge upon real or personal property, whether then owned by the assignor or contractor or not, or of personal property, whether it is then *in esse* or not, it attaches as a lien in equity or charge, or upon particular property, as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, voluntarily or with notice."[1]

In the District of Massachusetts, the late case of *Brett* v. *Carter*, before Judge Lowell in Bankruptcy, it was held, that this rule in equity applied to chattel mortgages. The numerous cases cited by him, as sustaining this view, are all cases in chancery courts for the foreclosure of real estate mortgages, with one or two exceptions,—many of them being actions brought by bondholders to foreclose railroad mortgages, where there was no question as to whether *personal property was mortgaged, or whether the mortgage was valid as to after-acquired personal property;* but the questions raised were, whether the after-acquired property, not then owned by the mortgagor, passed to the mortgagees, irrespective of the questions as to whether it was real or personal. The case of *Winslow* v. *Mitchell*, *supra*, was in bankruptcy; and the assignee was held to take the beneficial interest of the bankrupt, and that, un-

[1] Winslow v. Mitchell, 2 Story, 630; Preble v. Boghurst, 1 Swanst. 309; Needham v. Smith, 4 Russ. 318; Metcalf v. York, 1 M. & C. 553; Field v. Mayor, &c., 6 N. Y. 179; Langton v. Horton, 1 Hare, 549.

der equitable principles, a chattel mortgage was held to convey a valid lien in equity upon after-acquired property. How utterly antagonistic these two rulings are to every decision in this country, where the question was squarely raised, the cases cited in note 1 will show. Judge Lowell cites *Pennock* v. *Coe*, 23 How. 117. The court in that case say, by Justice Nelson: "The main argument is founded upon the maxim that 'a person cannot grant a thing which he has not,' '*ille non habet, non dat;*' and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity; *for equity no more than law can deny it: the thing itself is an impossibility.* It may at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, REAL OR PERSONAL, *in præsenti*, which does not belong to him, or has no existence, the deed or mortgage, as the case may be, is inoperative, and this either in a court of law or equity," and in deciding *Pennock* v. *Coe*, the court stated that this principle had no application to that case, in which the question was as to after-acquired rolling stock and railway equipments. The question as to whether a mortgage of personal property which contains a provision including after-acquired property, is valid, was not under consideration. Judge Story, in *Winslow* v. *Mitchell*, distinctly refuses to apply the doctrine there established in a contest between mortgagees or creditors, but decides the case in conformity with the then existing Bankrupt Law, between the assignee in bankruptcy and the mortgagee, as to the estate which vests in the assignee under such a mortgage, but in case of a contest between creditors and a mortgagee under a mortgage purporting to extend the lien of a mortgage upon property to be acquired *in futuro* from the proceeds of sales made by the mortgagor of the property

mortgaged, the rule could not be applied. The case of *Winslow* v. *Mitchell*, reiterates and reaffirms the doctrine laid down in the first part of this section; the doctrine established by the Supreme Court of the United States,[1] declares such mortgages totally and absolutely void as a matter of law, and not a question of fact to be ascertained by a jury. As between mortgagor and mortgagee, where there are no intervening rights, such arrangements may be carried into effect in any number of cases, which are never heard of in courts; but when the rights of others intervene there can be but one course to take; and that is, to declare such instruments absolutely void as to all after-acquired property. Therefore, a mortgage which professes to convey property not in existence at the time is, as a conveyance, void, simply because there is nothing to convey. So a contract which purports to transfer property not in existence, cannot operate as an immediate alienation, simply because there is nothing to transfer; but if a mortgagee has agreed to mortgage property, real or personal, of which he was not possessed at the time of making the contract, and afterwards becomes possessed of the property, which is of such a nature that SPECIFIC PERFORMANCE would be decreed, the beneficial interest in the property is transferred to the mortgagee as soon as the property is acquired. And the title of the mortgagor or assignee will prevail, not only against a judgment creditor, but against a purchaser for value of the specific thing, unless he has fortified himself with actual possession, without knowledge of the mortgage.[2]

Some courts have attempted to hold this class of mortgages valid upon the same theory that is applied in cases

[1] Robinson v. Elliott, 22 Wall, 513. 193; 10 H. L. C. 214; Reeve. v.
[2] Holroyd v. Marshall, 33 L. I. Ch. Whittemore, 32 L. I. Ch. 497.

where real estate is sold or conveyed with a covenant or warranty, holding that the mortgagee's title enures by way of estoppel; but the difference between the two transactions is so great, and in fact antagonistic, that it is impossible to see the slightest similarity between them. In the case of a sale or mortgage of real estate, the grantor covenants that he has a good and legal title. In the case of a chattel mortgage, the grantor covenants that he not only has no title, but no possession, and that the thing he proposes to convey has no existence as far as he is concerned; it is to be purchased at some future time; in fact, may not be within the jurisdiction of the State where the mortgage is made. And how can such a title enure? The only and real question is, whether a person engaged in business can make a valid contract or conveyance in favor of one creditor, by which he shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, permitting the mortgagor to sell and purchase, like an unqualified owner, the lien attaching to what is on hand at the time it is sought to be enforced. The proposition only requires to be stated to be refuted.

But, in a late case in New York, the Court of Appeals established this principle: that a clause in a chattel mortgage upon a stock of goods which purports to extend the lien of the mortgage over after-acquired property, does not render the mortgage absolutely void, where there is no arrangement permitting the mortgagor to deal with the goods mortgaged, and no knowledge of such dealing on the part of the mortgagee, and the absence of intent to defraud creditors is affirmatively found.[1] In England, upon equitable principles, a mortgage containing a power to seize after-acquired or substituted property

[1] Yates v. Olmsted, 56 N. Y. 632.

will be effectual to bind such property.[1] And a mortgage of a ship, with all the oil then in her, and all that may be taken during the voyage, was held good.[2]

§ 47. There is, however, another class of cases, in regard to after-acquired property, which, while directly opposed to *Winslow* v. *Mitchell* and *Brett* v. *Carter*, as to the effect of the mortgage, establish this proposition: that, while a mortgage is void as to all after-acquired property, yet if before other rights are acquired the mortgagee reduces the property to possession, or the mortgagor turns the property over to him, he may hold it as against creditors and others,[3] on the principle that it is a license for the mortgagee to enter and obtain possession if he can, or that it is an executory contract, which is completed by his obtaining possession. This rule is wrong upon principle; and while it is the law of the State, as announced by its highest tribunals, it is neither justice nor equity. The mortgage is either wholly void as to after-acquired property, or it is valid as to all. We have already seen that it is void as to creditors, and the mortgagor, if he so elects. It is unjust and inequitable, for the reason that it gives a premium for fraud, and encourages and rewards dishonesty. Take this case: A., who is a merchant, disposes of his entire stock in trade to B., who, being unable to pay the whole of the consideration for the sale, executes a mortgage to A. upon that and all after-acquired property purchased, for the purpose of replenishing his stock. The mortgagor, in the usual

[1] Chiddell v. Galesworthy, 6 C. B. N. S. 471; Lunn v. Thornton, 1 C. B. 379; Congreve v. Evetts, 10 Exchq. 298.

[2] Titus v. Maybee, 25 Ill. 257; Gregg v. Sandford, 24 Ill. 17; Hope v. Hayley, 34 E. & L. & Eq. 189; Walkan v. Vaughn, 33 Conn. 577; Farmers, &c. v. Com. Bank, 11 Wis. 207; Rowan v. Rifle Co., 29 Conn. 282; Rowley v. Rice, 11 Met. 333.

[3] Langton v. Horton, 1 Hare, 549.

course of trade, is constantly selling the mortgaged property, and buying additional goods, as he is unable to conduct his business unless he does. He makes his purchases from numerous merchants in the large commercial centres, hundreds of miles distant from his place of business, and the residence of the mortgagee. The mortgagor may have disposed of the greater portion of the original stock, without any payments being made to the mortgagee. Having on hand more than the original amount of property, which, since the execution of the mortgage, has been purchased on credit, the mortgagee, on breach of condition, by collusion with the mortgagor, obtains possession of all the property of the mortgagor, and under this doctrine holds it, in defiance of the rights of creditors who may have their remedy against the surplus, if any, not exempt by law. That this is the obvious result of this doctrine, it is only necessary to cite the case of *Chapman* v. *Wiemar*, 4 Ohio S. 481, where it was established by the Supreme Court of that State. Were it as easy to establish by evidence before a court, fraud in a transaction of this kind, as it is to perpetrate it outside of a court-room, such decisions would not have been made.

§ 48. **After-acquired Rolling Stock.**—There has been, by a long series of adjudications in almost every court of last resort in the Union and in England, a distinction made between various classes of property to be acquired subsequently to the execution of the mortgage. While it may be stated, that a mortgage containing an implied or express permission to the mortgagor to retain possession of property, and sell or dispose of the same, is void upon its face, mortgages of property which is not the subject of constant sale—as rolling stock of a

railway company; something that is to be purchased or subsequently acquired, perhaps with the identical money loaned by the mortgagee to the mortgagor for the express purpose of acquiring such property, and in order to furnish the means and facilities for satisfying the mortgage debt —has been regarded by many courts as subject to the mortgage lien.[1] While the cases cited (*supra*) from the New York courts can not now be considered as authoritative; the leading case of *Pennock* v. *Coe*, and those adopting the doctrines there laid down, have settled the rule in the Federal as well as in those State courts where followed, upon the principle that the appurtenances, equipments, etc., being expressly mentioned in the mortgage, and one of the main considerations for the loan,—one of the objects for which the loan was obtained, the extension, completion and operation of the road, and the mortgage of the road-bed, appurtenances, equipments, or rolling stock being authorized by special legislative enactments, or such mortgages, recognized as valid by subsequent acts of the Legislature,—it became necessary to give such a construction to the acts of the mortgagors as the authority providing for such mortgages intended. The decisions do not draw the distinction between real and personal property, in establishing the rights of mortgagees.

[1] Pennock v. Coe, 23 How. 117; Dunham v. Cin. &c. R. R. Co., 1 Wall. 254; Galveston R. R. Co. v. Cowdry, 11 Wall. 483; U. S. v. New Orleans R. R., 12 Wall. 362; R. R. Co. v. Soutter, 13 Wall. 517; Williamson v. New Albany, &c. Co., 1 Biss. 198; Dunham v. Earle, 2 Red. R.R.Cas. 506; Morril v. Noyes, 56 Me. 458; Haven v. Emery, 33 N. H. 66; Seymour v. C. & N. R. R., 25 Barb. 284; Stevens v. B. & N. Y. R. R., 31 Barb. 590; B., N. Y. & E. R. R. v. Sampson, 47 Barb. 533; Benjamin v. Elmira R. R. Co., 49 Barb. 441; Fish v. Potter 2 Abb. Ct. App. 138; Stevens v. Watson, 4 Abb. Ct. App. 302; Willink v. Morris Canal Co., 3 Greene Ch. 377; Phil., Wil. & B. R. R. v. Waelpper, 64 Penn. 360; State v. N. C. R. R., 18 Md. 193; Ludlow v. Hunt, 1 Dis. 552; Coe v. McBrown 22 Ind. 252, Pierce v. M. & St. P. R. R., 24 Wis. 551.

They do not establish the doctrine that a mortgage of after-acquired personal property is valid; nor do they adjudicate the questions which are treated of in the preceding sections. That mortgages or conveyances may include real and personal property, there can be no question; and the effect of such conveyances depends wholly upon the question of notice, as far as the rights of strangers to the transaction are concerned. The statutes provide what shall be notice; and a compliance with the statute is all that is required. It is also in the power of the State Legislature to declare what contracts shall be valid, and to pass laws recognizing contracts already made as valid. In the cases above cited, the authority to execute such mortgages was especially conferred, or ratified by legislation, after being executed. So that, as authority upon the question of the validity of a mortgage of after-acquired or substituted personal property, the decisions can have no effect. We do not consider that the adjudications above referred to establish the doctrine that rolling stock is a fixture, so as to pass under a mortgage of the road without any more definite description of the property conveyed. In each of the cases the property was described as the road, appurtenances, equipments, etc.; and, being thus specifically mentioned, the distinction between a mortgage of a tract of land, describing it by metes and bounds, and a railroad describing it and all its equipments, etc., must be readily perceived. In the former case the land, and all that is appurtenant to it, passes under the general description; in the other, everything intended to be conveyed is specifically described. The construction given to such mortgages, in the case of *Pennock* v. *Coe*, is in accordance with the authority given by the Legislature of the State of Ohio, authorizing the company to mortgage, hypothecate and pledge all or

any real or personal property belonging to it; and it seems reasonable that such a construction should be given. The terms of the conveyance, in that case, were "all present and future to be acquired property of the parties of the first part,"—that is to say, "their road, made or to be made,—and all rails and other material, etc., including iron rails and equipments, procured or to be procured, etc." The court say: We have no occasion to call in question, much less to deny the soundness of the maxim, "*ille non habet, non dat*," as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is not whether a person can grant, *in præsenti*, property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfillment of an express agreement, founded upon a good and valuable consideration; and this when no rule of law is infringed, or *the rights of a third party prejudiced.* The contest being between various mortgagees, and the road having been built and equipped before the second mortgage had been executed, their rights could not have been prejudiced by the first mortgage: as they took it with notice that all the rolling stock then in existence on the road was covered by the first mortgage; and upon this state of facts the decision was made.

§ 49. **Rights of Creditors under Railroad Mortgages.**—Up to the present time there has been no adjudication which settles the rights of creditors, laborers, or material-men in regard to their claims against a railroad company, where the property is encumbered by mortgages, and the mortgagor insolvent. This is a serious question,

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and is as yet unsettled,—Judge Miller, of the Supreme Court of the United States, in the Circuit Court of the United States for the District of Iowa, holding that a railroad mortgage, after being duly recorded, is valid, and notice to all the world as to the rights, priority and lien of the mortgagees; and that, as against such a mortgage, property conveyed by it cannot be sold on execution for work or material furnished after the execution and record of the mortgage; while, in another case, it has been decided that the income of the road should be appropriated for the satisfaction of such claims. The question to be settled is one that is not as easily disposed of as it might seem to be upon first impression. Can a laborer, employee, or a dealer in railroad supplies furnish labor or material, and have his claims postponed to that of the mortgagee? or, have they any rights which can be enforced against such mortgagor? The security of the mortgagee, which depends ultimately and almost solely upon the ability of the road to run and produce a revenue, would be seriously impaired if such creditors are allowed to seize the rolling stock, etc.; while it would be difficult to establish the line between the rights of judgment creditors and mortgagees, and would necessarily result in a vast and continuous amount of litigation, without affording any just relief between the parties. There is great hardship in the cases of unsecured creditors of insolvent corporations, whose property is tied up in mortgages for more than they are worth, and who are thus enabled to, and do practice frauds upon their creditors. In most cases, the very thing for which the credit is given enters into and becomes part of the road, and enhances its value to the benefit of the mortgagees; while it is a great evil, courts are powerless in affording relief unless there is some legislative enactment giving a lien, with a right to enforce

it within a specified time; and until some such statute is enacted, parties dealing with such corporations must refuse to give credit, or else take security for payment. As long as this class of corporations can procure the enactment of laws enabling them to execute mortgages of their present and future-acquired property, real and personal, and comply with such laws, courts must consider such a statute as part of the contract, and enforce the rights of the mortgagees, no matter how unjust and hard it may be on creditors and others with unsecured claims. The only remedy that can be applied, in such cases, is to treat the corporation mortgagor the same as an individual mortgagor, in case he retains possession of the mortgaged property,—to levy upon and sell the mortgagor's right of possession and redemption, which, until default and forfeiture, or until reduced to possession by the mortgagee, is subject to levy and sale on execution; and the purchaser, having the mortgagor's right of possession, may use the property until the debt is paid from the profits or earnings, or it is taken from him under the mortgage. This rule is well settled between mortgagor and mortgagee and creditors, who are natural persons; and there is no reason why it should not be equally applicable to corporations. The mortgagee, in case of default or forfeiture, may reduce the property to possession; and, in case of foreclosure, the only difference would be in making the owners and holders of the equity of redemption parties in lieu of the mortgagor, and would in many cases hasten the time for foreclosure, and thus prevent the perpetration of a series of frauds which are constantly being perpetrated upon individuals who are now, to a great extent, remediless, by reason of the doctrine established by the courts of this country in regard to such mortgages.

# CHAPTER IV.

## OF THE CONSIDERATION.

MORTGAGES FOR PRECEDENT DEBTS.—MORTGAGES TO SECURE FUTURE ADVANCES.—DESCRIPTION OF THE DEBT.—PAROL EVIDENCE TO IDENTIFY THE DEBT.—TAKING NEW NOTES.—RENEWAL AND SUBSTITUTION OF NOTES AND MORTGAGES.—VALIDITY OF A MORTGAGE, AS AFFECTED BY THE DEBT.—VARIANCE IN THE DESCRIPTION.

§ 50. Having learned what property may be encumbered as security for a debt, and the results of vague and indefinite descriptions thereof, we now arrive in regular order at another important matter connected with, and from which the system of mortgaging originated,—viz., THE DEBT. It may be laid down as a general rule, that a mortgage is an evidence of debt,—a mere security; an instrument, the purpose of which is to secure a debt.[1] No other written evidence of debt than that furnished by the instrument itself is necessary to sustain a mortgage.[2]

§ 51. **Of the Consideration for a Mortgage.**—It is not necessary that the consideration should move from the mortgagee; a mortgage may be valid, though made to a third party; as, where a bank renews a note on consideration that a mortgage shall be given to a third person. This is a sufficient legal consideration for the mortgage.[3] So, where notes are given by a third party as the consideration of a mortgage, which notes agree in amount with

[1] Ede v. Johnson, 15 Cal. 53.
[2] Graham v. Stevens, 34 Vt. 166.
[3] Magruder v. State Bank, 18 Ark. 9.

the consideration expressed in the mortgage, they are admissible to prove the consideration.[1] So, a note given by A. to B., and by B. endorsed to C., constitutes a contingent indebtedness from A. to B., so long as B.'s liability continues thereon, and as such is secured by a mortgage given to secure all indebtedness by note, account, or otherwise;[2] and a mortgage given by the principal to his bail, to indemnify them against loss on account of his liability, in case of forfeiture, is founded on a sufficient consideration, and is valid.[3] So a mortgage may be given to indemnify the mortgagee for becoming surety, or endorser; his liability forms a sufficient consideration, though the liability be subsequently incurred; and such a mortgage will be valid against subsequent encumbrances.[4] In order to create a liability upon a mortgage executed to guarantee a loan, the loan must be such as was recited in the mortgage.[5] Forbearance of legal or equitable rights forms a good consideration for a mortgage, and will make it valid;[6] and this, even though no actual benefit accrue to the mortgagor. Thus, if the mortgagee, at the request of the mortgagor, forbear to institute legal proceedings or discontinues legal proceedings, already commenced against a third party for the enforcement of a lawful claim or demand[7] for any convenient or reasonable period, or sus-

[1] Foster v. Berkey, 8 Minn. 351.

[2] Treat v. Gilmore, 49 Me. 34.

[3] Simpson v. Roberts, 35 Ga. 180.

[4] Uhler v. Semple, 20 N. J. Eq. 288; Goddard v. Sawyer, 9 Allen, 78; Kramer v. Bank of Steubenville, 15 Ohio, 253.

[5] Thomas v. Olney, 16 Ill. 53.

[6] Alliance Bank v. Broom, 2 Drew & Son, 289; Bracewell v. Williams, L. R. 2 C. P.

[7] Jennison v. Stafford, 1 Cush. 168; Rood v. Jones, 1 Doug. (Mich.) 188; Giles v. Ackles, 9 Barr. 247; Silvis v. Ely, 3 W. & S. 420; Watson v. Randall, 20 Wend. 201; Ford v. Rehman, Wright, 439; Gilman v. Kibeer, 5 Humph. 19; Colgin v. Henley, 6 Leigh, 85; Martin v. Black, 20 Ala. 389; McKinley v. Watkins, 13 Ill. 140; Russell v. Cook, 3 Hill, 504; Seaman v. Seaman, 12 Wend. 381; Stewart v. Ahrenpelett, 4 Den. 89; Sage v. Wilcox, 6 Conn. 81; Clarke v. Russell, 3 Watts. 213; Sidwell v. Evans, 1 Penn. 380.

pends or withdraws an execution against the goods or person of such third party, the suspension or withdrawal of such execution, or the forbearance of further proceedings, forms a sufficient consideration for a promise of the mortgagor to pay the money to the mortgagee, or to satisfy the full amount of his claim.[1] Forbearing to collect a debt for three months, is sufficient consideration for a mortgage to secure the debt, if any consideration is necessary;[2] and where a mortgagor agrees with the mortgagee that, if he will not foreclose, he will give him another mortgage on the property, the second mortgage is a good consideration for withholding the foreclosure of the first, and is valid.[3] While a mortgage should, in order to notify creditors and others of the extent of the incumbrances, specify the amount for which it is executed, such instrument is not void between the parties merely because the face does not disclose the precise debts or liabilities, or their nature, for which it is given to secure.[4] There may be several mortgages on record, which, upon their face, would show that they were for distinct debts, which might mislead creditors. But where other mortgages are made to secure the same or original debt, with accrued interest and costs, this fact may be shown, that they are merely additional evidence of, and security for, the same debt.[5] In New Hampshire, if a mortgage is given to secure a debt, liability, or agreement, such debt, liability, or agreement must be strictly between the mortgagor and mortgagee.[6]

[1] Smith v. Algar, 1 B. & A. 603; Morton v. Burn, 7 A. & E. 19, Pilkington, 2 B. & P. 151; Sugars v. Brinkworth, 4 Camp. 46; Rood v. Jones, 1 Doug. (Mich.) 188.

[2] Bank of Muskingum v. Carpenter, Wright (O.) 729.

[3] Andus v. Nelson, 64 Barb. 362.

[4] Griffin v. Cranston, 1 Bosw. 281.

[5] Anderson v. Davis, 6 Munf. 484.

[6] Parker v. Morrison, 20 N. H. 280.

It will not be considered fraudulent solely because the note it secures covers the amount of a debt for which the mortgagee is liable; nor because the true character as a liability, and not a debt, is not stated.[1]

**What Consideration will be sufficient to Sustain a Mortgage?**—A consideration of loss or inconvenience sustained by one party at the request of another, is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. It is sufficient, if there be any detriment or damage to the plaintiff, though no actual benefit accrue to the party undertaking.[2] If a mortgagee has become security for a mortgagor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration for the mortgage, although no actual benefit has resulted to the mortgagor.[3] Any trouble, or labor too, however slight, undertaken by a mortgagee at the request of a mortgagor, although such trouble and labor may have been unsuccessful and productive of no benefit to the mortgagor,[4]—the abandonment and discontinuance of an action brought to enforce a doubtful right or claim, are sufficient consideration.[5] But not the abandonment of a suit, when the mortgagee

[1] Prescott v. Hayes, 43 N. H. 593.

[2] Bunn v. Gulf, 4 East. 194; Jones v. Ashburnham, Id. 466; Glasgow v. Hobbs, 32 Ind. 440; Sykes v. Lafferty, 27 Ark. 407; Carr v. Carr, 34 Miss. 513; Stebins v. Smith, 4 Pick. 97; Smith v. Weed, 20 Wend. 184; Heigh v. Brooks, 2 P. & D. 447; Farmer v. Stewart, 2 N. H. 97; Waterman v. Barratt, 4 Harr. (Del.) 311; Nicholson v. May, Wright (O.) 660; Henman v. Moulton, 14 Johns. 466; Williams v. Alexander, 4 Ired. Eq. 207; Whitbeck v. Whitbeck, 9 Cow. 266.

[3] Bailey v. Croft, 4 Taunt. 611; Williamson v. Clements, 1 Taunt. 523.

[4] Shirlyn v. Albany, Cro. Eliz. 67; March v. Culpeper, Cro. Car. 71.

[5] Longridge v. Dowille, 5 B. & A. 117; Stracey v. Bank of England, 4 M. & P. 639; Llewellyn v. Llewellyn, 15 L. J. Q. B. 4.

knows and has admitted that he had no cause of action at all;[1] and so is a compromise of a disputed claim made *bona fide*, even though it ultimately appears that the claim was unfounded;[2] and this, though litigation has not commenced.[3] And if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration.[4]

§ 52. **Of Mortgages, the Consideration of which are Pre-existing Debts.**—In regard to this class of mortgages, there are no well-defined or settled principles. Courts have established the doctrine that a conveyance given in good faith, for a former subsisting debt, is a valuable and sufficient consideration for a mortgage;[5] and this rule holds good, even where a mortgage is executed by one of the members of a partnership to secure the debt of the firm.[6] Mortgages, grants, and conveyances, in the nature of mortgages, to secure antecedent debts, are regarded by the law with no disfavor, and are constantly sustained.

In Massachusetts, in a late case decided by Judge Lowell, it was held, that an insolvent trader may mort-

[1] Wade v. Simon, 15 L. J. C. P. 114; Graham v. Jackson, L. R. 8 Eq. 36.

[2] Callisher v. Bischoppsheim, L. R. 5 Q. B. 449; Pitkin v. Noyes, 48 N. H. 294; Fullam v. Adams, 39 Vt. 391; Curry v. Davis, 44 Ala. 281.

[3] Zane v. Zane, 6 Munf. 406; Black v. Peck, 11 Vt. 483; Truett v. Chaplin, 4 Hawks, 178; Thalman v. Barbour, 5 Ind. 178.

[4] Edwards v. Baugh, 11 M. & W. 641.

[5] Wright v. Bundy, 11 Ind. 395; Cooley v. Hobart, 8 Iowa, 358; North v. Crowell, 11 N. H. 251; De-Wolf v. Strader, 26 Ill. 225; Swift v. Tyson, 16 Pet. 1; Woolfolk v. Bank of America, 10 Bush. 504; Gioverrich v. Citizens' Bank, 26 La. 15; Maitland v. Citizens' National Bank, 40 Md. 540.

[6] Cooley v. Hobart, 8 Iowa, 358.

gage his stock and tools for present and future advances, with the actual honest intent to raise money to continue his business. Such a mortgage would not necessarily be fraudulent, though a part of the consideration were an existing debt;[1] where a debt is due, but barred by the statute of limitations, a mortgage given to secure it is valid as against creditors.[2]

In Alabama, the doctrine there established is the reverse, holding that a conveyance made in satisfaction of a precedent debt, although in the nature of a mortgage, containing a provision for redemption, cannot take effect as a mortgage,—a mortgage being impossible where no debt exists.[3]

In New York and Texas, the distinction made by the courts is in regard to the right of parties,—that the mortgagee is not entitled to protection as a *bona fide* purchaser for a valuable consideration, and he is not to be so regarded within the spirit of the recording acts, on the ground that he surrenders no security or parts with any value, and that his mortgage cannot supplant prior equities of which he had no notice, nor can he question the rights of the holder of the legal title to the property.[4]

The decisions in New York have been questioned and overruled in almost all the State courts and the Supreme Court of the United States; and it is difficult to

[1] In re Ames, 1 Low. 561.

[2] Merrills v. Swift, 18 Conn. 268.

[3] Boyd v. Beck, 29 Ala. 703; Woodburn v. Chamberlain, 17 Barb. 446; West v. Hendricks, 28 Ala. 226; Sewell v. Price, 32 Ala. 97.

[4] Spurlock v. Sullivan, 36 Texas, 511; Root v. French, 13 Wend. 570; Wardell v. Howell, 9 Wend. 170; Cary v. White, 52 N. Y. 138; Lawrence v. Clark, 36 N. Y. 128; Wood v. Robinson, 22 N. Y. 564; Thompson v. Van Vechten, 27 N. Y. 568; Webster v. Van Steenbergh, 47 Barb. 211; Hallock v. Smith, 3 Id. 267; Picket v. Bannon, 29 Id. 505; Bay v. Coddington, 20 Johns. 651; Woodburn v. Chamberlain, 17 Barb. 446; Cheesbrough v. Wright, 41 Barb. 28; Farrington v. Bank, 24 Id. 504; Wiles v. Clapp, 41 Id. 645.

reconcile the New York decisions above cited with another class of New York cases, which have followed the universal and well-settled rule, that an agreement to give time and forbearance is a sufficient and valuable consideration.[1] In sustaining this doctrine as to forbearance, the New York courts hold that there must be an agreement to that effect between the parties; that, where the original debt is simply secured without any evidence that there was an agreement to extend the time for payment, or the creditor surrenders the evidence of the debt, and takes a renewal thereof, payable at some future time, it is not an extension or forbearance, but that the creditor may bring suit as soon as he pleases, without awaiting the time for which the security is given. The Supreme Court of the United States, in *Swift* v. *Tyson*, 16 Pet. 1, lay down the principle that receiving a note as security for a pre-existing debt is according to the usual course of business, and entitles the taker to all the rights and benefits of a holder, *bona fide*, and for a valuable consideration. The cases in which these questions arise are between mortgagees and creditors. Outside of the Alabama cases, there are none that I have been able to find which hold that a mortgage, to secure a pre-existing debt, is void between the parties. It may be laid down, as a general rule, that whatever is a sufficient consideration for a promissory note, is a sufficiently valuable consideration for a chattel mortgage to secure that note, whether it be a pre-existing debt or one contracted at the time the mortgage is executed. It is not only reasonable to presume, but it is a just, legal, and almost conclusive presumption, that no man would execute a mortgage to se-

[1] Watson v. Randall, 20 Wend. 291; Burns v. Rowland, 40 Barb. 368; Traders' Bank v. Broedner, 43 Id. 379; Merch. &c. Bank v. Wixon, 42 N. Y. 438; Pratt v. Cowan, 37 N. Y. 440; Picket v. Barron, 29 Barb. 505.

cure a pre-existing debt, if the debt could not be collected by law; for, in such a case, it could make but little difference whether he obtained an extension of time or not; if the debt could be collected, the presumption is as conclusive that a creditor would not take security when he could at once proceed and make his claim, if good, without security. So that, whenever a mortgage is made to secure a pre-existing debt, and no new evidence of the debt is taken, but simply a mortgage to secure it, it may safely be presumed that the debtor wanted time, and the creditor security, and both obtained their objects. So that the agreement to extend the time, and forbear to sue, must be regarded as granted to the debtor, upon his executing the mortgage to his creditor. If an agreement to forbear is a valid consideration for a promissory note, and the holder of such note is entitled to all the rights of a *bona fide* holder for a valuable consideration, can the holder of such a note, who extends the time of payment, upon receiving a mortgage to secure that debt, be placed in a worse position than if he merely took a new note without any security? The mortgagee, in such a case, is entitled to the same protection as any other *bona fide* creditor would be, who has obtained security; and if his mortgage is the prior lien, he is entitled to the prior satisfaction, provided he has complied with the statute controlling such transactions. Thus, where a defeasance in a mortgage is for the payment of the debt, according to the condition of a note or bond recited in the mortgage, the mortgage will not be avoided because the day on which the note or bond is made payable is already passed at the time of the execution of the mortgage. Such a mortgage is to be considered as a securety merely, and treated as such.[1]

[1] Hughes v. Edwards, 7 Wheat. 489.

§ 53. **Mortgages to secure Future Advances.**—In treating of the consideration of mortgages, the question as to whether money to be advanced, or liabilities to be incurred at some future time, is a sufficient consideration to sustain a mortgage, becomes important. Many mortgages are executed as security for a much larger sum than is actually loaned, or to secure liabilities to a greater extent than are actually incurred at the time of their execution; and under this head it will be necessary to ascertain to what extent a mortgage of this kind is valid, and to what amount it will be entitled to priority as a security. There cannot be a more fair, *bona fide*, and valuable consideration than the drawing or endorsing of notes at a future period, for the benefit or request of the mortgagor, or the advancing, at some future time, of sums of money to assist a party in business; and nothing is more reasonable than the providing of a sufficient indemnity beforehand. It is a matter of frequent occurrence, for a person who expects to increase his indebtedness to certain creditors, to mortgage his property to such creditors for debts to be contracted, as well as that which is already due. A mortgage may be given to secure a debt not yet in existence, or for a debt which may not be realized in part.[1] In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle in the law can be considered as settled by the decisions of courts, that a mortgage made to secure future liabilities and contingent debts, described with reasonable certainty, in the absence of all fraudulent intention, is valid;[2] and this, whether the matter of future advances

[1] Collins v. His Creditors, 18 La. Ann. 235.

[2] Lawrence v. Tucker, 23 How. 14; Googins v. Gilmore, 49 Me. 9; James v. Morey, 2 Cow. 246; endrix v. Robinson, 2 Johns. Ch. 309; Shirras v. Craig, 7 Cranch, 34; U. S. v. Hooe, 3 Id 73; Jones v. Smith, 2 Ves. Jr.,

appears on the face of the instrument or note, or is proved solely by the testimony of witnesses.[1] Nor is it absolutely necessary, to the validity of a mortgage, that it should

376; Lowthian v. Hasel, 3 Brown Ch. 162; Hubbard v. Savage, 8 Conn. 215; Chester v. Wheelwright, 15 Id. 562; Frink v. Branch, 16 Id. 139; Conard v. At. Ins. Co., 1 Pet. 386; Badlam v. Tucker, 1 Pick. 398; Adams v. Wheeler, 10 Id. 199; Com. Bank v. Cunningham, 24 Id. 270; Johnson v. Bourne, 2 Y. & C. 268; Garber v. Henry, 6 Watts, 57; Stewart v. Stoker, 1 Id. 135; Leeds v. Cameron, 3 Sumn. 488; Worth v. Crowell, 11 N. H. 251; McDaniels v. Colvin, 16 Vt. 300; Craig v. Tappan, 2 Sand. Ch. 78; Bank of Utica v. Finch, 3 Barb. Ch. 293; Collins v. Carlisle, 13 Ill. 254; Mobile, &c. R.R. v. Talman, 15 Ala. 472; Fairbanks v. Bloomfield, 5 Duer, 434; Westcott v. Gunn, 4 Id. 107; Thomas v. Kelsey, 30 Barb. 368; Bell v. Fleming, 1 Beasl. 13; Terhoven v. Kerns, 2 Penn. 96; Lyle v. Ducomb, 5 Binn. 585; James v. Morey, 6 Johns. Ch. 420; Ward v. Cooper, 2 Green (N. J.) 93; James v. Rice, 27 E. L. & Eq. 342; Truscott v. King, 6 N. Y. 147; Kramer v. Bank, &c. 15 Ohio, 253; Edmonds v. Cranshaw, 1 McCord Ch. 252; Atkinson v. Maling, 2 T. R. 462; Holbrook v. Baker, 5 Me. 309; Carpenter v. Blote, 1 E. D. Smith, 491; Greenwood v. Murdock, 9 Gray, 20; Griffin v. N. J. &c. Co., 3 Stockt. 49; Boswell v. Goodwin, 31 Conn. 74; Spier v. Skinner, 35 Ill. 282; Williamson v. Russell, 13 Md. 494; Fassett v. Smith, 23 N. Y. 252; Pickengill v. Brown, 7 La. 298; Collins v. His Creditors, 18 Id. 235; Goddard v. Sawyer, 9 Allen, 78; Foster v. Reynolds, 38 Mo. 533; Seaman v. Fleming, 7 Rich. Eq. 283; Tully v. Harlow, 35 Cal. 302; De Wolf v. Harris, 4 Mason, 510; Wolf v. Wolf, 12 La. 529; Jarrett v. Warren, 12 Mass. 300; Macomber v. Parker, 14 Pick. 197; Gardner v. Webber, 17 Pick. 407; Calkins v. Lockwood, 16 Conn. 276; Worsley v. De Mattos, 1 Burr, 467; Doyle v. Smith, 1 Cald. 15; Cole v. Alhers, 1 Gill, 412; Townsend v. Empire Co., 6 Duer, 208; Lansing v. Woodworth, 1 Sand. Ch. 48; Allen v. Montgomery R. R. Co., 11 Ala. 437; Coles v. Sellers, 1 Phila. 533; Crane v. Deming, 7 Conn. 387; Wilder v. Winne, 6 Cow. 284; Smyth v. Ripley, 33 Conn. 306; McGavock v. Deery, 1 Cold. 265; U. S. v. Lennox, 2 Paine, 180; Irwin v. Wilson, 3 Jones Eq. 210; Blood v. Palmer, 11 Me. 414; Miller v. Lockwood, 32 N. Y. 293; Griffin v. Stoddard, 12 Ala. 783; Bevins v. Dunham, 1 Spears, 39; Summers v. Roos, 43 Miss. 749.

[1] In re Langston, 17 Ves. 228; In re Warner, Id. 202; In re Whitehead, Id. 209; In re Kensington, 2 V. & B. 79; Rolfe v. Chester, 25 L. & R. 246; Collins v. Carlisle, 13 Ill. 251; Bank, &c. v. Finch, 3 Barb. Ch. 293; Griffin v. N. J. & Co., 13 Stockt. 49; Craig v. Tappan, 2 Sand. Ch. 78; Shirras v. Craig, 7 Cranch, 34; Hendrick v. Robinson, 2 Johns. Ch. 283; Brinkerhoff v. Marvin, 3 Ill. 320; James v. Johnson, 6 Ill. 417.

truly state the debt it is to secure; but it can stand as a security for the real, equitable claims of the mortgagees, whether they exist at the date of the mortgage, or arise afterwards upon the face of the mortgage, or before notice of another's equity.[1] But it is requisite that the agreement, as contained in the record of the lien, should give all the requisite information as to the extent and certainty of the contract; so that a junior creditor may, by an inspection of the record, ascertain the extent of the incumbrance. This is requisite to secure good faith, and prevent error and imposition in dealing.[2] Registry laws are intended to show the existence, and not the exact amount, of an incumbrance; and, therefore, the record of a mortgage for a specified amount, need not state that it is to secure future advances; as, where a mortgage is given to secure the payment of a note, "and also in consideration of the further sum of five hundred dollars," such mention of $500 is sufficient to put a subsequent purchaser on inquiry as to the true amount due under the mortgage.[3] The record of such a mortgage is good; an interested party can see that there is a mortgage; that the principal can not exceed the amount named: and that is all the information the record is intended to give him in any case. It is enough to put him upon inquiry; and an application to the mortgagee will disclose the sum certain for which the security is held; but if such person, with the notice that the record of such a mortgage contains, omits to make the inquiry which it indicates, he can claim no rights as a

[1] Shirras v. Craig, 7 Cranch, 34.

[2] Garber v. Henry, 6 Watts, 57; Stoughton v. Pascoe, 5 Conn. 442; Pettibone v. Griswold, 4 Conn. 458; St. Andrew's Church v. Tompkins, 7 Johns.Ch. 14; Truscott v King, 6 N. Y. 147; Bell v. Fleming, 1 Beasley, 13; Babcock v. Lisle. 57 Ill. 327.

[3] Babcock v. Lisle, 57 Ill. 327.

*bona fide* purchaser or incumbrancer. Questions as to the validity of a mortgage to secure future advances arise between subsequent mortgagees, creditors or purchasers. Their validity as to future advances depends, in a great measure, upon the question of notice. The doctrine on this subject is: that, where a purchaser has knowledge of any fact which is sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, or take as a security, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or has been guilty of such a degree of negligence as to deprive him of the rights of a *bona fide* purchaser or incumbrancer without notice. A mortgage to secure future advances is notice to all parties, though the advances are subsequent to the rights of other parties.[1] Such a mortgage is valid, although the purpose is not stated on its face; but, in such cases, there is greater ground of suspicion, and the mortgagee will be required to show the consideration by strict proof. It is certainly always advisable fairly and plainly to state the true contract. But if, upon investigation, the real transaction shall appear to be fair, though somewhat different from that set forth in the mortgage, the mortgagee will not be deprived of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation. An oral agreement between a mortgagor and a mortgagee, to allow the security to stand for additional advancements by the mortgagee to the mortgagor, will be enforced as against one claiming under the mortgagor with notice.[2]

Where the amount of such future advances is not stated in the mortgage, it is a lien as to future advances

[1] Edwards v. Cranshaw, 1 McCord Ch. 252.

[2] Stone v. Lane, 10 Allen, 74; Truscott v. King, 6 N. Y. 147.

as against intervening incumbrances only from the date of such future advances, not from the date of the mortgage;[1] and a first mortgagee thus situated, is bound to take notice of junior and intervening incumbrances, in the same manner as if he were about to take a new and independent mortgage from the party, having no reference whatever to the prior incumbrance.

Where a debtor mortgages his property to secure past and also future indebtedness up to a certain limited sum, and is at the time indebted to the mortgagee, in an amount exceeding that sum, the advances afterwards made will be held to have been made on the faith of the mortgage; and it is a valid security for the same, notwithstanding it is given to secure the past indebtedness, which had not been paid.[2] So an absolute conveyance (as a bill of sale), if it contains a provision for redemption, may be security for future advances, where a further loan is made on account of the conveyance, and the period for redemption is extended; and this may be shown by parol evidence.[3]

In New Hampshire, the statute requiring an oath to be taken in regard to the *bona fides* of the debt, precludes the making of a chattel mortgage to secure future advances,—the statute requiring the debt or liability intended to be secured to be specified in the condition of the mortgage. A general description of all debts or all demands will be insufficient, if the condition of a mortgage is broad enough to cover future claims; but it will be construed to apply to existing debts, or liabilities only, if the language does not forbid such construction; and the

[1] Bank of Montgomery's Appeal, 36 Penn. 170; Appeal of Bank of Commerce, 44 Penn. 443.

[2] Fassett v. Smith, 23 N. Y. 252.

[3] Kent v. Albretain, 5 Miss. 311; Barnes v. Holcomb, 20 Id. 306.

mortgage will not be void, for that cause, as to existing claims.[1]

§ 54. **The Amount or Limit of such Securities.**— Where mortgages are made to secure future advances, or a note and future advances in addition to a limited amount, they are valid, although there is no consideration paid at the time for the note,—if the note is to secure future advances; so that, at the time of the execution of the mortgage, there is no consideration paid.[2]

A mortgage, to secure future advances, the limit of which is not defined, is good for the amount of the advances thus made as against creditors and others as to all advances made prior to other encumbrances or liens on the same property; and it is valid for the excess only, in case that third persons have acquired no rights in the property.[3] It is valid as against a second mortgage to

[1] Page v. Ordway, 40 N. H. 253.

[2] Lawrence v. Tucker, 23 How. 14; Googins v. Gilmore, 47 Me. 9.

[3] Bell v. Fleming, 1 Beas. 13; Lawrence v. Tucker, 23 How. 14; Robinson v. Williams, 22 N. Y. 380; Monnot v. Ibert, 33 Barb. 24; Murray v. Barney, 34 Barb. 336; Boswell v. Goodwin, 31 Conn. 74; Barnard v. Moore, 8 Allen, 273; Ladue v. Detroit R. R. Co., 13 Mich. 380; Shepard v. Shepard, 6 Conn. 37; Spades v. Lawler, 17 Ohio, 371; Kramer v. Trustees, &c., 15 Ohio, 250; Bissell v. Kellogg, 60 Barb. 617; Ripley v. Harris, 3 Biss. 199; Lyle v. Ducombe, 5 Binn. 585; Parmentier v. Gillespie, 9 Penn. 84; Terhoven v. Kerns, 2 Id. 96; Meroney's Appeal, 24 Id. 372; Brinkerhoff v. Marvin, 5 Johns. Ch. 320; Shirras v. Craig, 7 Cranch, 34; Craig v. Tappan, 2 Sand. Ch. 78; Gardner v. Graham, 7 Vin. Abr. 52; Walling v. Aiken, 1 McMull. 1; Sumner v. Roos, 42 Miss. 749; Leeds v. Cameron, 3 Sumn. 448; Roet v. Hopkinson, 3 De G. & J. 177; Brown v. Frost, 1 Hoff. Ch. 41; Hubbard v. Savage, 8 Conn. 215; Walker v. Snediker, 1 Hoff. Ch. 145; Farnum v. Burnett, 21 N. J. Eq. 87; D'Neza v. Generes, 22 La. 285; Com. Bank v. Cunningham, 24 Pick. 270; Monell v. Smith, 5 Cow. 441; Hughes v. Worley, 1 Bibb. 200; Bank v. Willard, 10 N. H. 210; Lansing v. Woodward, 1 Sand. Ch. 43; Barry v. Merchants, &c. Co., 11 Id. 314; Averill v. Guthrie, 8 Dana, 83; U. S. v. Hooe, 3 Cranch, 73; Livingston v. McAulay, 16 Johns. 167; Truscott v. King, 6 N. H. 147; Rosevelt v. Mack, 6 Johns. Ch. 266; Conard v. Ins. Co., 1 Pet. 448; Divver v. McLaughlin, 2 Wend. 596; Westcott v. Gunn, 4 Duer, 107.

the extent of the advances made at the time such junior mortgage is given; but, as against all advances made after such time, the junior mortgage has priority.[1]

Where the mortgage limits the time within which such advances are to be made, it secures none made after such specified time;[2] but where a mortgage is given to secure a loan or an indorser on a note, stating that it is also to secure him, as indorser on a note to a certain amount, to be executed thereafter, or where but a portion of the money to be loaned is paid at the time, such a mortgage will be a valid security for the full amount therein specified.[3]

Where a mortgage to secure future advances to an amount certain, within a time limited, and the full amount was loaned and repaid, and further loans were made within the time limited, such loans were held covered by the mortgage, as against subsequent creditors.[4]

In regard to the nature of the advances to be made, there is no distinction between money and merchandise. A creditor, who is a merchant, may furnish his goods and wares to a certain amount, and it will be just the same as if the money was advanced with which to purchase the property.[5] A mortgage to secure future advances to be made to a firm will cover advances made by that firm, both before and after the admission of a new partner;[6] but it will not enure to secure advances made to their successors, after the dissolution of the original firm.[7]

[1] Craig v. Tappin, 2 Sand. Ch. 78; Carpenter v. Blote, 1 E. D. Smith, 491; Spader v. Lawler, 17 Ohio, 371; Frye v. Bank, &c., 11 Ill. 367.

[2] Miller v. Whittier, 36 Me. 577.

[3] Hubbard v. Savage, 8 Conn. 215; Ledyard v. Butler, 9 Paige, 132.

[4] Wilson v. Russell, 13 Md. 494.

[5] Brooks v. Lester, 35 Md. 65; Carpenter v. Blote, 1 E. D. Smith, 491.

[6] Lawrence v. Tucker, 23 How. 14.

[7] Monnot v. Ibert, 33 Barb. 24.

§ 55. **Limits as to Sureties.**—Where a mortgage is given to indemnify the mortgagee for his advances, and he lends his acceptances to the mortgagor, who is afterwards adjudged bankrupt, if the mortgagee, after such adjudication, buys up the mortgagor's paper at a discount, he cannot hold the mortgage as security for the full amount of such purchased paper; but the mortgage is simply a security for the actual amount paid for such paper.[1] Where a mortgage purports to be made to secure all debts due from the mortgagor to the mortgagee, and all suretyships of the mortgagee, it is valid to secure all such debts existing at the time of its execution, although not more particularly described.[2]

§ 56. **Of Tacking other Debts to that Secured by Mortgage.**—It is a well-settled principle of law, in the United States, that as to mortgages of real estate, subsequent debts, unless by special agreement between all the parties to a mortgage, will not be covered by such instrument. In regard to chattel mortgages, or mortgages of personal property, there is a distinction made in this particular: a subsequent advance made by a mortgagee of chattels will attach by tacking to the property in favor of such mortgagee; when it will not be permitted in case of a mortgage of land. For, without any proof of a distinct agreement, the property may be held until the subsequent as well as the original debt is paid, upon the principle that he who seeks equity must do equity; and the party seeking relief in court ought to pay all that is due his creditor,—the presumption being that the subsequent advances would not have been made but upon

[1] In re Ames, 1 Low, 561.

[2] Kramer v. Bank, &c., 15 Ohio, 53; Van Meter v. Van Meter, 3 Gratt. 253; Goddard v. Sawyer, 9 Allen, 78.

the credit of the property mortgaged, and will be tacked to it if no other encumbrancer resist.[1] In many cases it is held, that a previous agreement is necessary.[2] Where third parties rely upon a record, as to the amount of an encumbrance upon property, a subsequent debt should not be tacked to a mortgage, so as to prevent the enforcement of any rights they may have against such mortgaged chattels. But, in cases where the rights of third parties do not intervene, there is every reasonable intendment to be made in favor of the doctrine of tacking as to chattel mortgages.

§ 57. **Of the Description of the Debt.**—Having ascertained what consideration will sustain a mortgage, we will now proceed to show the manner of describing such debt or consideration. The object of having the amount for which the instrument is a security stated in the mortgage, is for the purpose of giving third parties notice of the amount of the encumbrance existing upon the property, so that they may not be deceived as regards the mortgagor's liabilities. Literal exactness in describing the indebtedness is not required in a mortgage; but it suffices if the description be correct as far as it goes, and distinct enough to direct attention to the sources of correct and full information, without danger that the language used will deceive or mislead parties.[3] The rule that

Downing v. Palmateer, 1 Mon. 64.

[1] James v. Morey, 2 Cow. 246; Shiras v. Craig, 7 Cranch, 34; Hendricks v. Robinson, 2 Johns. Ch. 309; U. S. v. Hooe, 3 Cranch, 73; Jones v. Smith, 2 Ves. J. 376; Lowthian v. Hasel, 3 Brown Ch. 162.

[2] Booth v. Barnum, 9 Conn. 286; Stoughton v. Pasco, 5 Conn. 442; Pettibone v. Griswold, 4 Conn. 158; Ricketson v. Richardson, 19 Cal. 330; Shepard v. Shepard, 6 Conn. 37; Frink v. Branch, 16 Conn. 260; Dargin v. Becker, 10 Iowa, 571; Webb v. Stone, 24 N. H. 282; Gilman v. Moody, 43 N. H. 239; Bacon v. Brown, 19 Conn. 33; Merrill v. Swift,

a mortgage must declare, with as much certainty as the nature of the case will admit of, the real state of the incumbrance on the property, applies equally to mortgages of personal and real property.[1] It is enough that the description in a mortgage of the instrument which it is given to secure, states correctly sufficient facts to identify the instrument with reasonable certainty; and it is not indispensable that all the particulars of such description should correspond precisely with the instrument, for the maxim, *falsa demonstratio non nocet*, applies; and if, to a description already adequate and sufficient to point out, with convenient certainty, the note intended to be secured, there be added that which is inapt and erroneous, the latter will not vitiate the former, *quicquid demonstratæ rei additur satis demonstratæ frustra est.* Clerical inaccuracies in the description of the debt will not invalidate the lien as against the mortgagor, or his subsequent judgment creditors, if the debt be unmistakably identified;[2] nor is it invalidated as to third persons when, upon the ordinary principles of allowing extrinsic evidence to apply a written contract to its proper subject-matter: the debt intended to be secured may be shown as between the parties themselves.[3] Thus, where three notes were secured by mortgage, and described therein by dates,

18 Conn. 264; Crane v. Drenning, 7 Conn. 396; Paine v. Benton, 32 Wis. 491; Robinson v. Stark, 15 N. H. 112; Boody v. Davis, 20 N. H. 140; Hurd v. Robinson, 11 Ohio, S. 222; Merch. &c. Bank v. Raymond, 27 Wis. 567; McKinster v. Babcock, 26 N. Y. 378; Youngs v. Wilson, 27 N. Y. 378; Hough v. Bailey, 32 Conn. 288; Williams v. Hilton, 35 Me. 547; Partridge v. Swazey, 46 Me. 414; Mich. Ins. Co. v. Brown, 11 Mich. 266; Robinson v. Williams, 22 N. Y. 380; Nelson v. Boyce, 7 J. J. Marsh, 401; Johns v. Church, 12 Pick. 557; Morrell v. Smith, 5 Cow. 441; U. S. v. Hooe, 3 Cranch, 73; Kramer v. Bank, &c., 15 Ohio, 253.

[1] Rood v. Welch, 28 Conn. 162.

[2] Tousley v. Tousley, 5 Ohio, S. 78; Gilman v. Moody, 43 N. H. 239; Sheafe v. Gerry, 18 N. H. 245; Porter v. Smith, 13 Vt. 492.

[3] Hurd v. Robinson, 10 Ohio, S. 232; Gill v. Pinney, 12 Ohio, S. 38; Tousley v. Tousley, 5 Ohio, S. 78.

amounts, names of parties, and time of payment, but the only reference to interest was that, in default of "payment of said sum of money, or the interest or any part thereof, etc.," the mortgagee might sell "and retain the principal and interest then due," interest was included in the notes. Where, by the law, the rate of interest is a subject of stipulation, and there is no presumption of an agreement upon any particular rate, such mortgage is good against subsequent purchasers from the mortgagor for the amount of interest specified in the notes.[1] So, where a mortgage was executed to secure the payment of $50 "in sixty days from the date hereof," meaning and intending the legal demands, "they (the mortgagees) have against me,"—held, that this condition was not void for uncertainty; the true construction of it being, that it was to secure the payment of the sum due, not exceeding $50;[2] and where a description of the note secured by the mortgage as being in a penal sum when the note produced is for the sum, without the penalty, it will not avoid it for want of reasonable certainty in the description.[3] So, a mortgage given to secure all existing debts, without specifying them, is not invalid for want of certainty in the amount secured.[4] So, a mortgage to secure "advances" for the purpose of carrying on the farm for the year 1870, sufficiently specifies the debt to secure which it is given.[5] The condition of a mortgage, which recited that the mortgagee has agreed to indorse for the mortgagor during a certain period of time, not exceeding an amount therein specified, and has already indorsed certain notes not yet due, stating where said notes are payable, as at certain banks,

[1] Ricketson v. Richardson, 19 Cal. 330.

[2] North v. Cowell, 11 N. H. 251.

[3] Frink v. Branch, 16 Conn. 260.

[4] Michigan Ins. Co. v. Brown, 11 Mich. 265.

[5] Allen v. Lathrop, 43 Ga. 133.

is a sufficiently certain description of the debt or liability.[1] Where a mortgage is executed to a number of mortgagees, and recites, as the consideration, certain debts due to them individually, which are therein referred to, such debts are secured by the mortgage, although they are several, and the mortgage is joint.[2] A mortgage to secure payment of a sum of money, may be sustained, though there is no contract, or other obligation of the mortgagor, or of any other person connected with it, to pay the same: the sum due under such a mortgage is due at once, and payment may be immediately enforced.[3]

A mortgage to secure liabilities incurred for the accommodation of the mortgagor, reciting a bond delivered at the same time, which was in fact never delivered, is valid.[4] It is not necessary, to the validity of a chattel mortgage as to third persons, that it should be for the payment of any sum certain, or of any money whatever; it may be for the performance of any other act, or of any contract by the mortgagor or third person. In those cases where there is no time specified for the performance of such act or contract in the mortgage itself, the law will require it to be performed within a reasonable time;[5] where it is made as security for the payment according to its tenor of a promissory note, payable at a day certain, which passed, the condition must be understood to be the payment of the note in its then existing state.[6] But where there is no covenant to pay the money secured by it, nor any express acknowledgment of indebtedness by the mortgagor, such mortgage creates no personal liability.[7]

[1] Tulley v. Smith, 24 Conn. 314.
[2] McGregor v. Chase, 37 Vt. 225.
[3] Brookings v. White, 49 Me. 479; Carnall v. Duvall, 22 Ark. 136.
[4] Goodhue v. Berrien 2 Sand. Ch. 630.
[5] Byram v. Gordon, 11 Mich. 531.
[6] Pettis v. Kellogg, 7 Cush. 156.
[7] Coleman v. Van Rensselaer, 44 How. P. 368.

A mortgage is not void, between the parties, because the precise debt or liability is not disclosed on its face;[1] nor because it is given for a greater sum than is actually due;[2] as, where it is given to secure future advances.[3] The mere fact that a mortgage recites a greater indebtedness than actually exists at the time of its execution, is not conclusive evidence of fraud. The existence of fraud in such cases, must be determined from all the circumstances.[4]

In New Hampshire, the statute requires an affidavit of the parties as to the *bona fides* of the debt, and an accurate description thereof. If a mortgage is given as an indemnity for a contingent liability, the true character of the note must be stated in the condition, if it is stated as debt, it will be invalid as to creditors. So, if the whole sum be described as a debt, when part of it is merely an indemnity, the whole will be invalid against creditors, whether there is any fraudulent design or not.[5] But it is not necessary that all the particulars of the debt to be indemnified against, or the thing to be done, should be specified in the mortgage; for, where a part of the description is incorrect, it may be rejected when enough remains to identify the note, or thing to be done, as set forth in the condition of the mortgage.[6] Evidence that the mortgagor owed the debt, and that the note secured by the mortgage was given upon an adjustment of mutual pre-existing claims between the mortgagor and mortgagee, is competent to be weighed by a jury, as tending to show a full and sufficient consideration for a mortgage.[7]

[1] Griffin v. Cranston, 1 Bosw. 281.
[2] Gordon v. Preston, 1 Watts, 385.
[3] Miller v. Lockwood, 32 N. H. 293.
[4] Gordon v. Preston, 1 Watts, 385; Bell v. Prewit, 62 Ill. 261.
[5] Belknap v. Wendell, 31 N. H. 92.
[6] Gilman v. Moody, 43 N. H. 239.
[7] Ferguson v. Clifford, 37 N. H. 86.

§ 58. **The Validity of the Mortgage as Affected by the Debt.**—The validity of a mortgage depends on the genuineness of the debt which the mortgage is to secure, and not upon the description of the debt contained in the mortgage, nor upon the form of the indebtedness, whether by note or otherwise.[1] Where the consideration is illegal, or against public policy, such mortgage is void; as, where a mortgage is taken to secure a debt, but is executed on the consideration that the mortgagee will use his efforts to obtain a *nolle prosequi* to an indictment pending against the mortgagor, it is against public policy, and void.[2] But where it sought to avoid a mortgage on the ground that it was given to compound a felony, it should appear, 1st. That there was an agreement to compound a felony. 2d. That the mortgage was the result of the agreement; and, 3d. That the mortgagee knew of the illegal consideration at the time of taking the mortgage.[3] In Massachusetts, a note and mortgage, executed for the price of intoxicating liquors is invalid.[4] A note given where the consideration is for efforts made or services rendered in procuring the passage of a bill through any State, national, or municipal Legislature, is void; and a mortgage to secure such note is void also.[5]

§ 59. **Variance in the Description as Affecting**

[1] Hogdon v. Shannon, 44 N. H. 572; Jackson v. Bowen, 7 Cow. 13; Griffin v. Cranston, 1 Bosw. 281.

[2] Wildey v. Collier, 7 Md. 273.

[3] Earl v. Clute, 2 Abb. N. Y. App. 1.

[4] Barker v. Collins, 9 Allen, 253; Bingham v. Potter, 14 Gray, 522.

[5] Powers v. Skinner, 34 Vt. 274; Nost v. Inhabitants, 7 Allen, 152; Clippinger v. Hepbangle, 5 W. & S. 310; Marshall v. B. & O. R. R., 16 How, 314; Rose v. Truax, 21 Barb. 361; Hunt v. Test, 7 Ala. 13; Hatzfield v. Gulden, 7 Watts, 152; Wood v. McCann, 6 David, 366; Fuller v. Dame, 18 Pick. 472; Commonwealth v. Callaghan, 2 Virginia Cas. 460; Gulick v. Ward, 5 Halst. 87; Harris v. Roof, 10 Barb. 489.

**the Rights of Third Persons and Mortgagees.**—To render a mortgage valid against attaching creditors of the mortgagor, there must be at least a distinct and specific condition, that can be clearly stated, on performance of which the property will be released. Words implying generally, "indemnity for the past and security for future," are insufficient;[1] and also, where the amount of the note is not given in the mortgage.[2] If the condition of the mortgage is, that it shall be void on the payment of certain notes therein particularly described, by their amounts and dates, according to their tenor, and the mortgagee never had any notes conforming to those described, either in amounts or dates,—such mortgagee acquires no title to the property mortgaged by virtue of such mortgage, although he at the time was the holder of certain notes against the mortgagor for different sums, and with different dates.[3] The security afforded in a mortgage only extends to those debts set forth and recorded in the instrument.[4] In such case the mortgagee is entitled to relief, and may have the mortgage reformed to correspond with the notes if the intention was to secure them.[5] So, where the maker of several notes payable to his own order, makes a mortgage to a third person to secure their payment, he thereby admits that they are valid securities for the payment of money in the hands of the mortgagee, although not regularly indorsed;[6] and the mortgage is not avoided by reason of its being made to a person other than the payee in the note. So a misrecital in a mortgage, that the mortgagees were indorsers

[1] Fairfield, &c. Ins. Co. v. Nye, 60 Me. 372.

[2] Hart v. Chalker, 14 Conn. 79.

[3] Jewett v. Prescott, 27 Me. 400; Follett v. Heath, 15 Wis. 601.

[4] Whiting v. Beebe, 12 Ark. 421 Thorp v. Feltz, 6 B. Mon. 6.

[5] Follett v. Heath, 10 Wis. 601; Porter v. Smith, 13 Vt. 492.

[6] Hartwell v. Blocker, 6 Ala. 581.

on two bills of exchange, where in fact they were for one only, and paid the other for the honor of the drawer before the execution of the mortgage, will not avoid it.[1]

§ 60. **Parol Evidence Admissible to identify the Debts, and show the Consideration for a Mortgage.**—It is the general rule, that parol evidence cannot be given to contradict or vary written instruments. To this there are some exceptions. Parol evidence may be given to contradict or explain a mere receipt; and this rule has been constantly applied to the acknowledgment of the receipt of the consideration in a deed. The consideration clause in a conveyance is subject to the utmost latitude of inquiry; but whenever it becomes material to a personal action between the parties, it is a general rule, that parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. It may be shown that its purpose was security for future advances, or for balances which might be due from time to time.[2] Thus, a recital in a mortgage of an indebtedness of one thousand dollars for money advanced, as the consideration does not preclude the mortgagee from showing, in an action against an officer to recover the value of the property attached by him as the property of the mortgagor, that the real consideration was his indorsement of the mortgagor's note for one thousand dollars, and of two notes of five hundred dollars each, substituted for the one of a thousand, and that he relied on the mortgage as security for the said substituted notes.[3] It is not requisite that

[1] Felter v. Cirode, 4 B. Mon. 482.

[2] Foster v. Reynolds, 38 Mo. 553; McKinster v. Babcock, 37 Barb. 265.

[3] McKinster v. Babcock, 26 N. Y. 378.

the condition should be so completely certain as to preclude the necessity of extraneous inquiry;[1] for the debt or note, secured by a mortgage, may be shown by parol evidence.[2] That a note offered in evidence is the one secured by mortgage, may be proved by parol, though it vary in its date from the description of it in the condition of the mortgage.[3] A misrecital of the bond or debt in a mortgage, will not vitiate it; as the mortgagee may show, by parol, what bond or debt was intended to be secured.[4] Where there is a discrepancy between the amount stated as the consideration in a mortgage and the note it is intended to secure, and the note accurately describes the debt intended to be secured, such discrepancy will not vitiate the mortgage, nor render it fraudulent as to creditors. A mortgage is only an incumbrance to the amount of the note, and to such an amount the mortgagee has a lien. The consideration may be shown by parol evidence.[5] and it will be sustained where the amount of the note is understated in the mortgage, if it appears the note is the one which the parties intended to secure.[6] And, where

[1] Kramer v. Bank, 15 Ohio, 253; U. S. v. Hooe, 3 Cranch, 73; Stoughton v. Pasco, 5 Conn. 442; Merrills v. Swift, 18 Id. 257; Robinson v. Williams, 22 N. Y. 380; Morrell v. Smith, 5 Cow. 441; Young v. Wilson, 27 N. Y. 351.

[2] Goddard v. Sawyer, 9 Allen, 78; Doe v. McLoskey, 1 Ala. 708; Williams v. Hilton, 35 Me. 547; Somersworth, &c. Bank v. Roberts, 38 N. H. 22; Kent v. Albritain, 5 Miss. 317; Barnes v. Holcomb, 20 Miss. 306; Rolfe v. Chester, 25 L. J. R. 246; Collins v. Carlisle, 13 Ill. 251; Bank v. Finch, 3 Barb. Ch. 293; Shirras v. Craig, 7 Cranch, 34; Partridge v. Swazey, 46 Me. 414; Johns v. Church, 12 Pick. 557; Boody v. Davis, 20 N. H. 140; McKinster v. Babcock, 26 N. Y. 378; Hurd v. Robinson, 11 Ohio S. 232; Price v. Gover, 40 Md. 102; Babcock v. Lisle, 57 Ill. 327; Kuysing v. Hughes, 64 Ill. 123.

[3] Sweetzer v. Lowell, 33 Me. 446; Melvin v. Fellows, 33 N. H. 401; Ellis v. Kenyon, 25 Ind. 134; Johns v. Church, 12 Pick. 557; Williams v. Hilton, 35 Me. 547; Paine v. Benton, 32 Wis. 491.

[4] Jackson v. Bowen, 7 Cow. 13.

[5] Kuysing v. Hughes, 64 Ill. 123.

[6] Cushman v. Luther, 53 N. H. 562.

a mortgage on its face purports to have been executed to secure the payment of a certain specified sum of money, according to the condition of a certain note or bond, and it appears that no such bond was ever executed, that fact of itself is not fatal to the claims of the mortgagee, as parol proof may be received to sustain the mortgage.[1] No other written evidence of a debt than that furnished by the instrument itself is necessary to sustain it:[2] it is *prima facie* evidence of a just debt;[3] and where an indebtedness is shown to the amount secured by a mortgage, no further evidence of an indebtedness between the parties is necessary to be shown.[4] Parol evidence is admissible to prove an additional agreement not disclosed by the mortgage, and not inconsistent with it, as a further consideration for the contract.[5] And where the language of a mortgage, offered to show title in the claimants as against execution creditors, does not conclusively import a joint indebtedness, which might be inferred from some of the facts alleged, evidence of such facts is admissible to aid in the interpretation of the language.[6] So it is admissible to show that a mortgage was given without consideration.[7]

§ 61. **Of the Renewal and Substitution of Other Notes for those described in the Mortgage.**—Cases frequently arise wherein the mortgagee, at the maturity of the note for which the mortgage is given to secure, is not ready or able to pay the same. The mortgagee consenting to an extension of time, upon receiving new notes

[1] Baldwin v. Raplee, 4 Penn. 433; Gillett v. Powells, Spears Ch. 142; Goodhue v. Berrien, 2 Sand. Ch. 630.

[2] Graham v. Stephens, 34 Vt. 166.

[3] Gillett v. Powells, Spears Ch. 142; Ede v. Johnson, 15 Cal. 53.

[4] Doniphan v. Paxton, 19 Mo. 288.

[5] Abbott v. Marshall, 48 Me. 44.

[6] Heuston v. Squires, 9 Ind. 27.

[7] Clark v. Houghton, 12 Gray, 38.

or evidences of the debt, without desiring a new mortgage, either on account of the rights of third parties, or to save the expense of executing and recording new mortgages, the effect of such a proceeding, is what we propose to consider in this place. It is sometimes one of the conditions of a mortgage, that it is to secure a certain note or debt, and all notes in renewal of that debt. Where such a provision is inserted in the mortgage, the instrument is a continuous lien on the property, for the purpose of securing the payment of all new notes given in renewal of the original;[1] nor is it necessary that the new notes should be for the same amount and payable at the same length of time, or that each should be applied to discharge its predecessor, in order that they be renewals of the original notes.[2] In cases where there is no such provision in the mortgage, and a mortgagor, upon the maturity of the note described therein, takes up his note, and executes a new one for the same amount or a balance due, such proceeding is not a payment of the debt secured by the mortgage. The promissory note is merely the evidence of an indebtedness, and the substitution of one note for another does not discharge the debt, nor affect the security. The lien continues until the debt is paid or extinguished, or the lien itself destroyed, by agreement between the parties. Until the debt is paid, all collateral securities stand; the security of a mortgage is in no way impaired.[3] So that a mortgagee does not

[1] Handy v. Com. Bank, &c., 10 B. Mon. 98.

[2] Gault v. McGrath, 32 Penn. 392.

[3] Butler v. Miller, 1 N. Y. 500; Gregory v. Thomas, 20 Wend. 17; Williams v. Starr, 5 Wis. 534; Boyd v. Beck, 29 Ala. 703; Chapman v. Jenkins, 31 Barb. 164; Bank, &c. v. Finch, 8 Barb.Ch. 293; Elliott v. Sleeper, 2 N. H. 525; Farmers' Bank v. Mutual, &c. Society, 3 Leigh, 69; Watkins v. Hill, 8 Pick. 522; Pomeroy v. Rice, 16 Pick. 22; Choteau v. Thompson, 3 Ohio S. 421; Heard v. Evans, 1 Free. Ch. 79; Smith v. Stanley, 37 Me. 11; Whittaker v. Dick, 6

lose his security by the mere extension of the time of payment, where it is not the intention of either party to discharge the mortgage security, although that extension is in the form of a renewal of the note which was given as a collateral security for the same debt; it is competent for the parties to change the time and mode of payment, and still retain the security.[1] Where a mortgage is given to secure a certain debt, it will be a valid security for that purpose, whatever form the debt may assume, if it can be traced,[2] and, where the instrument is executed for the purpose of indemnifying the indorser of an accommodation note, to be discounted at a bank, it stands as security for each successive renewal, whether it be so expressed in the mortgage or not, where such is the usage of the bank.[3]

Miss. 296; Dana v. Binney, 7 Vt. 501; Bolles v. Chauncey, 8 Conn. 389; Burton v. Pressly, 1 Ohio, 1; Burdett v. Clay, 8 B. Mon. 287; Bank, &c. v. Rose, 1 Strobh. Eq. 257; Flower v. Elwood, 66 Ill. 438; Lippold v. Held, 58 Mo. 213; Spring v. Hill, 6 Cal. 17; Conner v. Banks, 18 Ala. 42; Swan v. Taple, 38 Iowa, 248; Bobbitt v. Flowers, 1 Swan, 511; Seymour v. Darrow, 31 Vt. 122; Cleveland v. Martin, 2 Head, 128; Robinson v. Urquhart, 1 Beasl. 515; Packard v. Kingman, 11 Iowa, 219; Cissna v. Haines, 18 Ind. 496; Boswell v. Goodwin, 31 Conn. 74; Chase v. Abbot, 20 Iowa, 104; Callard v. Mathews, 10 La. 233; Baxter v. McIntire, 13 Gray, 171; Euston v. Friday, 2 Rich. 427; Cullum v. Branch Bank, 23 Ala. 797; Hadlock v. Bulfinch, 31 Me. 296; Markel v. Eichelberger, 12 Md. 78; Osborne v. Benson, 5 Mass. 157; Binnell v. Eskie, 9 Cal. 104; Strachn v. Foss, 43 N. H. 43; Williams v. Little, 12 N. H. 29; McDonald v. McDonald, 16 Vt. 630; Gault v. McGrath, 32 Penn. 392; Dunshee v. Parmlee, 19 Vt. 172; Smith v. Prince, 14 Conn. 472; De Cotter v. Jeffers, 7 Fla. 284; Brown v. Scott, 51 Penn. 397; Hugenin v. Starkweather, 10 Ill. 492; Bank v. Willard, 10 N. H. 210; Binkerhoff v. Lansing, 4 Johns. Ch. 65; Parkhurst v. Cummings, 56 Me. 155; Darst v. Bates, 51 Ill. 439; Morse v. Clayton, 21 Miss. 373; Manhood v. Crick, Cro. Eliz. 17; Norwood v. Gripe, Id. 727; Rawdon v. Turton, Browne, 74; Maynard v. Crick, Cro. Car. 86; Enes's Case, Lit. Rep. 58; Higgins' Case, 6 Rep. 45; Rhodes v. Barnes, 1 Burr, 9; Phelps v. Johnson, 8 Johns. 54; Dunham v. Dey, 15 Johns. 555; Flower v. Elwood, 66 Ill. 438; Griffith In re, 1 Low, 431.

[1] Williams v. Starr, 5 Wis. 534.

[2] Patterson v. Johnston, 7 Ohio, 225.

[3] Euston v. Friday, 2 Rich. 427.

We have seen that the extension of time and giving of new notes will not affect the lien of the mortgage; nor will the execution of a new mortgage, to secure such new notes, have any other effect,—a note being merely an evidence of a debt, and a mortgage simply security for the debt; it remains as such security until in some way separately cancelled or the debt is discharged. It is also a well-settled principle of law, both ancient and modern, that a subsequent security for a debt of equal degree with a former, will not, by operation of law, extinguish it.[1] So that the taking of a second mortgage for the same debt, will not relinquish the first, without an express release of the first; and this, even where the note and mortgage given in renewal is for a larger amount than the original, as where it includes interest.[2] It is a question of law for a court to determine, except where such an arrangement is a question of intention, as in Massachusetts, where it is to be determined by a jury.[3]

If mortgaged property is sold by permission and consent of the mortgagee, and another mortgage is subsequently taken to secure the same debt, it is a new security, and not a mere substitution of securities.[4] So where the seller of a stock of goods, who had taken the note of the vendee therefor secured by mortgage of the goods, after

[1] Butler v. Miller, 1 N. Y. 500; Gregory v. Thomas, 20 Wend. 17; Higgins's Case, 6 Rep. 45; Manhood v. Crick, Cro. Eliz. 716; Norwood v. Gripe, Cro. Eliz. 727; Rawdon v. Turton, Browne, 74; Phelps v. Johnson, 8 Johns. 54; Preston v. Preston, Cro. Eliz. 817; Mumford v. Stocker, 1 Cow. 178; Cowell v. Lamb, 20 Johns. 407; Enes's Case, Lit. R. 58; Day v. Leal, 14 Johns. 404; Rhoades v. Barnes, 1 Burr. 9; Hamilton v. Cullender, 1 Dall. 420; Andrews v. Smith, 9 Wend. 53; Dunham v. Dey, 15 Johns. 555; Hill v. Beebee, 13 N. Y. 556; Davis v. Maynard, 9 Mass. 247.

[2] Burnhisel v. Furman, 22 Wall. 170. Boyd v. Beck, 20 Ala. 703; Packard v. Kingman, 11 Iowa, 219; Burdett v. Clay, 8 B. Mon. 287; Hill v Beebee, 13 N. Y. 556.

Taft v. Boyd, 13 Allen, 84.

[4] Forbes v. Howe, 102 Mass. 427.

receiving payment in part, being told by the mortgagor that he had a number of debts coming due which he could not pay, delivered up his note and mortgage and took another note, secured by a new mortgage of the stock, as altered and increased by labor, sales and purchases, such transaction extinguished the original mortgage,—that the second mortgage was void as against proceedings in insolvency, instituted within six months after it was given.[1]

It is a rule in equity, that an incumbrance shall be kept alive, or considered extinguished, as shall most advance the justice of the case.[2] The application of this rule occurs most frequently in cases where a debtor obtains an extension of time by giving a new note, or a new note and mortgage, which includes not only the original debt, but the interest, and usurious interest, in many instances. Such transactions, where the debtor sets up the plea of usury, are governed by the well-settled principle that, if a security founded upon a prior one be fatally tainted with that vice, and the prior one were free from it, but given up and cancelled, and the latter one thereafter adjudged void, the prior or original one will be revived, and may be enforced as if the latter had not been given.[3] It is a

[1] Paine v. Waite, 11 Gray, 190.

[2] Burnhisel v. Firman, 22 Wall. 179; Starr v. Ellis, 6 Johns. Ch. 395; Neville v. Demeritt, Green's Ch. 366; Barnes v. Cammack, 1 Barb. 396; Loomis v. Hudson, 18 Iowa, 416; East Ind. Co. v. Donald, 9 Ves. 284; Hore v. Beecher, 12 Simons, 468.

[3] Parker v. Cousins, 2 Gratt. 389; F. & M. Bank v. Joslyn, 37 N. Y. 353; Cook v. Barnes, 36 N. Y. 521; Rice v. Welling, 5 Wend. 595; Avery v. Hackley, 20 Wall. 407; Ferral v. Shanen, 1 Saund. 295; Rex v. Allen, T. Raymd. 197; Queen v. Sewell, 7 Mod. 119; Graly v. Fowler, 1 H. Bl. 462; Fusil v. Brookes, 2 C. & P. 314; Phillips v. Cockayne, 3 Camp. 119; Bush v. Livingston, 3 Caines Cas. 66; Swartout v. Payne, 19 Johns. 294; Hughes v. Wheeler, 8 Cow. 77; Merrills v. Law, 9 Cow. 65; Rice v. Welling, 5 Wend. 595; Hammond v. Hopping, 13 Wend. 505; Vilas v. Jones, 1 N. Y. 276; Johnson v. Johnson, 11 Mass. 359; Troutman v. Barnett, 9 Ga. 30;

clear rule of the common law, that a subsisting simple contract is not discharged or relinquished by the acceptance of another contract of the same nature, given by the same party, and founded upon the same consideration, unless it be expressly so agreed. And if a valid new contract or security does not extinguish or destroy the pre-existing debt for which it is given, it would be strange if a contract void for usury, should have that effect. A note void in its creation for being usurious, will not defeat and destroy an existing liability, against which there is no defense. A contract originally valid remains so, and stands unaffected by any subsequent arrangement, which is utterly void. Such renewal will be protected, even as against the bankrupt law. Thus, where a person owing money, principal and interest, for some time overdue, but secured by mortgage, accounts with his creditor, and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole sum, and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security, and so open to attack under the bankrupt law, if made within four months before a decree in bankruptcy against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt. For, if the new mortgage and note is invalid, the cancellation and surrender of the prior ones will have been without the shadow of a consideration. If such were the rule, a

Eastman v. Porter, 14 Wis. 39; Meshke v. Van Doren, 16 Wis. 339; Kahley in re, 4 B. R. 124; Ladd v. Wiggin, 35 N. H. 428; Towle v. Hoit, 14 N. H. 63; Stedman v. Vickery, 42 Me. 136; Hoyt v. Dimon, 5 Day, 483; Brett v. Aylett, 11 Ark. 475; Mead v. Combs, 4 C. E. Green, 112; Ripley v. Severance, 6 Pick. 474; Sawyer v. Turpin, 5 B. R. 339; Stokoe v. Cowan, 29 Beav. 637; White v. Garner, 2 Bingh. 23.

creditor would lose his debt without fault on his part, and contrary to the intent of both debtor and creditor in making the change of securities. The creditor will be in no better situation than if he had surrendered the original securities, upon being paid in coin or currency, which he believed to be good, but which turned out to be counterfeit. Where there is a failure of consideration and fraud or mistake in such cases, a court of equity will annul the cancellation, and revive the securities. Upon being so revived, they resume their former efficacy.[1]

[1] Burnhisel v. Firman, 22 Wall. 170.

# CHAPTER V.

## DELIVERY OF MORTGAGES.

### WHAT IS SUFFICIENT.—WHAT IS NOT A VALID DELIVERY.

§ 62. Having executed a mortgage in proper form for a valid consideration, the next and last step is to deliver the instrument to the mortgagee, and have it accepted.

§ 63. **Delivery and Acceptance by the Mortgagee.**—Delivery is another incident essential to the due execution of a mortgage, for it takes effect only from the delivery. By delivery is meant the transfer from the mortgagor to the mortgagee, or some person acting in his behalf, in such a manner as to deprive the mortgagor of the right to recall it at his option. The delivery of a mortgage is essential to perfect title in the mortgagee, as regards the rights of third persons. While the date of a mortgage is not absolutely essential, although it is customary to insert one, the presumption is that it is delivered at the time it is dated: it is always permissible to show the true time of delivery.[1] No particular form of procedure is necessary to effect a delivery: it may be by acts merely, by words, or by both combined. In order to complete a delivery, acceptance of a mortgage by the

[1] Burdett v. Hunt, 25 Me. 419; Geiss v. Ofenheimer, 4 Yeates, 278; Merrill v. Dawson, 1 Hemp. 563; Harrison v. Phillips Academy, 12 Mass. 456; Stonebreaker v. Kerr, 40 Ind. 186; Partridge v. Swazey, 46 Me. 414.

mortgagee is necessary; if there is no delivery, there is no mortgage.[1]

§ 64. **What is Evidence of a Delivery.**—There need not be an actual manual delivery of the instrument by the mortgagor to the mortgagee, but there must be some act on the part of both, which in legal contemplation would be equivalent to it. Thus, the making of a mortgage in pursuance of a previous request by the mortgagee, and a delivery of it for registry, followed by acts on the part of the mortgagee, assenting to and adopting the mortgage, are evidence from which a jury may infer a delivery of the mortgage from the time such adoption takes place, although the original is lost or destroyed after being recorded.[2] Subsequent possession, by the mortgagee, is evidence of a delivery to him.[3] But where a mortgage is delivered to the register of deeds, without the knowledge of the mortgagee, more than a year after there had been an agreement to execute one between the parties, this is not necessarily a valid delivery of it, but is evidence of such delivery to be submitted to a jury.[4]

§ 65. **Delivery to and by an Attorney.**—When money is sent to an attorney to be invested, and he applies it to his own use, executing and filing a mortgage to his principal as security, it is a valid delivery of the mortgage as against third parties.[5] So the acts of an attorney, in receiving a mortgage from a debtor in favor of certain creditors, without authority from them, may be

[1] Folley v. Howard, 8 Iowa, 56.

[2] Thayer v. Clark, 6 Cush. 11.

[3] Evarts v. Agnes, 6 Wis. 453; Black v. Shreve, 2 Beasl. 456; Smith v. Bank, 32 Vt. 341; Foster v. Perkins, 42 Me. 168; Haskell v. Sevier, 25 Ark. 152; Chandler v. Temple, 4 Cush. 235; Rhine v. Robinson, 27 Pa. St. 30.

[4] Jordan v. Farnsworth, 15 Gray, 517.

[5] Sargeant v. Solberg, 22 Wis. 132.

ratified by a subsequent assent, and the mortgage enforced.[1] A refusal of one of the mortgagees to accept such mortgage will not impair it as to the mortgages made to and accepted by the other creditors.[2]

§ 66. **Delivery where there are Several Mortgagees or Mortgages.**—Where one mortgage, purporting to be made to several persons, to secure the payment of a several debt to each of them, is delivered to one of the mortgagees, it becomes the deed of the mortgagor for all the purposes expressed in it; and cannot be restrained by the use of words, on the part of the mortgagor, so as to make it take effect as his deed to one of the mortgagees only, and not as to the others.[3] A mortgage, to be valid, must not only be signed, but it must be delivered by the maker, and accepted by the mortgagee, or by some one legally acting for him.[4] Where a debtor, at the same time, executes and causes to be recorded separate and independent mortgages of the same property to several of his creditors, without the knowledge of either, that mortgage which is soonest ratified will first have effect; the others becoming operative by subsequent ratification will be subject to it.[5]

§ 67. **Ratification of Mortgagor's Acts.**—Being executed by delivering, such mortgage, when filed for record and accepted by the mortgagee, is a ratification of the act of the mortgagor, and gives it legal effect from the time of filing.[6] Ratification being necessary to the validity of a mortgage, it may be ratified by the mort-

[1] Brown v. Platt, 8 Bosw. 324; Id.
[2] Id.
[3] Hubby v. Hubby, 5 Cush. 516.
[4] Freeman v. Perry, 23 Ark. 439; Foster v. Beardsley, 47 Barb. 505.
[5] Oxnard v. Blake, 45 Me. 602.
[6] Carnall v. Duvall, 22 Ark. 136.

gagee after recording or filing, without requiring a new registration.[1] Where a mortgage is attacked by creditors, on the ground that it was executed without the consent of the mortgagee, his assent will be presumed.[2] A mortgagor, by changing the date, and by redelivering the mortgage to the mortgagee, may convert it into a new mortgage.[3]

§ 68. **What is not Sufficient Delivery.**— The execution of a chattel mortgage, and the filing of the same, without the knowledge or authority of the mortgagee, is insufficient.[4] The carrying of an instrument to an office to be filed or recorded, is not a delivery, nor evidence of a grantee's acceptance,[5] unless it is deposited and left in charge of the register, for the use of the mortgagee, and the mortgagor intends to part with the possession and all power and control over the instrument; but where a mortgage is sent to the Recorder's office by the mortgagor, without the knowledge of the mortgagee, and is wholly subject to the mortgagor's control, with no intention of present delivery, it is invalid.[6] And, though made effectual by a subsequent acceptance, or a ratification of the mortgage, it cannot affect the rights of another, which mortgagee acquired by a prior ratification of a mortgage to him of the same property, recorded at the same time.[7]

[1] Sherman v. Fitch, 98 Mass. 59.

[2] Ensworth v. Kirby, 50 Mo. 417.

[3] McIsaacs v. Hobbs, 8 Dana, 268.

[4] Dale v. Bodman, 3 Met. 139; Baird v. Williams, 19 Pick. 381; McCourt v. Myers, 8 Wis. 236.

[5] Maynard v. Maynard, 10 Mass. 456; Bullard v. Hinkley, 5 Me. 272; Hedge v. Drewe, 12 Pick. 141; Jackson v. McCrea, 1 Johns. Cas. 116; Jackson v. Phipps, 12 Johns. 418; Elsey v. Metcalf, 1 Denio, 323; Commercial Bank v. Pickles, 1 Hals. Ch. 430; Wiggins v. Lusk, 12 Ill. 132; Cooper v. Jackson, 4 Wis. 550; Herbert v. Herbert, 1 Ill. 278; McCourt v. Meyers, 8 Wis. 236; Oxnard v. Blake, 45 Me. 602.

[6] McCourt v. Meyers, 8 Wis. 236; Dale v. Bodman, 3 Met. 139; Miller v. Blienburg, 21 Wis. 676.

[7] Oxnard v. Blake, 45 Me. 602.

# BOOK II.

## OF THE VALIDITY OF CHATTEL MORTGAGES AS DEPENDING UPON THE DELIVERY OF POSSESSION, REGISTRATION, OR FILING.

## CHAPTER VI.

GENERAL PRINCIPLES RELATING TO THE VALIDITY OF CHATTEL MORTGAGES.—RULE IN TWYNE'S CASE.—MODIFICATION OF THE RULE.—RETENTION OF POSSESSION.—NOT *per se* FRAUDULENT.

§ 69. **Who entitled to Possession until Breach of Condition.**—In treating of this branch of the subject-matter relating to the validity of chattel mortgages, it will be necessary to consider the effect of the adjudications at common law, and under the statute of frauds and fraudulent conveyances. The modifications and innovations upon these adjudications, which are the result of modern statutes, known as the Registration Acts, by which a system has been established that, to a very great extent, has rendered the delivery of possession unnecessary, in so far as the *bona fides* of the transaction is concerned. Then to treat of the effect of registration, filing and refiling; the effect of certain acts of the mortgagor while in possession, and other matters in connection therewith.

§ 70. **Good faith One of the Requisites of a Valid Mortgage.**—An essential circumstance, necessary to the

validity of every conveyance of property, whether personal or real, is that it be perfectly clear from fraud and collusion, which are things the law abhors, and, therefore, declares void all acts that depend upon them, though otherwise good. In order to enforce this doctrine, statutes have declared and made void all fraudulent conveyances of real and personal property as against creditors and purchasers. The circumstances which amount to fraud is a question of law, upon the facts of each peculiar case. Among other matters which have been regarded as fraudulent, is that of a vendor continuing in full possession, and having the power of using property conveyed as his own, after an absolute and unqualified alienation,—thus enabling him to deceive and defraud others, by continuing to traffic with the property by him conveyed to another. Having ascertained what chattels or personal property may be the subject of a mortgage, it will be necessary to learn what degree of possession of a thing mortgaged ought to be delivered by a mortgagor to prevent the mortgagee from the imputation of fraud in respect to third persons, and the extent in which their state, nature, or condition varies the degree of posssession which ought to be given. Personal property is, in point of locality, movable or immovable, present or remote, and admits of several rights therein, generally described under the terms "rights in action," which includes all personal things in action, and rights in possession, which includes all personal things in possession. And these rights may be mortgaged in various modes, according as the things to which they relate are circumstanced in point of locality; which circumstance gives rise to several distinctions as to the degree of possession of which they respectively admit. The delivery of personal things admits of several modifications, in re-

spect of such things being in possession or in action, present or remote; which circumstances furnish exceptions to the general rule, of occasioning the substitution of other circumstances, in lieu of the actual delivery of possession. If personal things are in the visible possession of the vendor, and sold by him to another; if the vendee would have the contract to be clear of the imputation of fraud,—actual delivery ought to be made, unless, in the nature of the contract, something intervenes to delay or prevent such delivery. But personal things *in action* do not admit of any visible possession or actual delivery,—the vendor being himself, in such cases, possessed only of a right. The law, therefore, in that case, is satisfied with everything being done towards a delivery, which the nature of the thing admits, *ex gratia*,—delivery of all the documents by which the existence of the right can be evinced, accompanied with a transfer of the powers necessary to enforce the right. The simplest case of this kind, is the conditional transfer of a debt or bond, which is only assignable in equity, but not at law. The reason why it is assignable in equity is, because the assignor can furnish the assignee with all the means necessary to reduce it into possession by delivering the bond into the hands of the assignee to prove the debt, which is the *chose in action*, and by giving him authority to sue in the obligee's name. On an assignment of a bond, therefore, the delivery of the bond, accompanied with the power to sue, is equivalent in equity to an actual delivery on the conveyanee of goods in possession at law; for all that the nature of the thing admits is done to divest the right out of the assignor, and vest it in the assignee. But if the bond be detained by the assignor, the assignee will be liable to the imputation of fraud; because then the debt, by the assignor continu-

ing to hold the evidence of it in his hand, remains in his disposition; and he may assign it over to other persons, which is the mischief the statutes against fraudulent conveyances were intended to remedy. Upon the same principle, debts mentioned in a schedule, though not capable of delivery, may likewise be assigned conditionally; but, in such case, notice to the persons indebted seems to be indispensably necessary to protect the assignee from the imputation of fraud against third persons, in case of a subsequent assignment; because, unless such notice be given, debts may be again and again assigned, without the possibility of the latter assignees detecting the fraud.[1] Personal things in a remote situation, fall under the same principle: these admitting of no actual delivery, they pass by delivering over the means of reducing them into possession; that being the only delivery of which they are capable.[2] Vessels at sea are in this predicament: they may be mortgaged or absolutely sold, and possession transferred by delivery of the muniments respecting them. Upon this principle, the property of goods at sea is held by the possession of the bill of lading.[3] In regard to possession, there is a material and obvious distinction between real property, of which the vendor is in the visible possession, and personal property, of which the vendor is in possession. In the case of real property, possession is no evidence of ownership. But personal property, being absolutely in the power of the holder, the occupation thereof is the strongest index of ownership; for, since there is no way of coming at the knowledge of who is the owner of personal property but by seeing in whose possession it is, there is no other medium for de-

[1] Unwin v. Oliver, Cooke's Bank Laws, 34.

[2] Lanfear v. Sumner, 17 Mass. 110.

[3] Evans v. Maitlett, 1 Ld. Raymd. 271; Wright v. Campbell, 4 Burr. 2050; Caldwell v. Ball, 1 T. R. 215.

ciding on the property, but by concluding its annexation to that possession. The law, which must always be so moulded as to correspond with the intrinsic nature of things, considers the visible retention of the possession of chattels personal, after the cession of the property, *prima facie*, as an indication of fraud; because it is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods—for the reason holds good in both cases—should leave them with the vendor, unless the transfer were only colorable, as the parties had in view the procuring of a collusive credit to the vendor, from his possessing that which is in fact the property of another. With respect to the condition in which creditors or purchasers stand, in relation to sales prejudicial to them, where the vendor continues in possession of goods sold, the statutes declaring certain sales void make no distinction between absolute and conditional sales, provided they are fraudulent; it being a settled rule of construction, that statutes made against fraud shall be liberally and beneficially expounded, so as to suppress the fraud.[1] And conveyances made to the end, purpose and intent to defraud creditors and purchasers, being by such statutes, as to such creditors and purchasers, declared void, it became incumbent on courts of law and equity, which, in such cases, have a concurrent jurisdiction,—on considering all the circumstances of each case, to decide whether a conveyance was made with intent to defraud. And, in the exercise of this discretionary power, given by these statutes to adjudge of the intent from the circumstances, it has been held, as to creditors in respect to goods, that

[1] McCulloch v. Hutchinson, 7 Watts, 434; Stevens v. Sole, 1 Ves. 352; Ryan v. Rowles, 1 Atk. 165; Brown v. Heathcote, 1 Atk. 160; Twyne's Case, 3 Coke. 80; Gooch's Case, 5 Coke. 60; Codogan v. Kennett, 2 Cowp. 432.

any neglect in leaving the vendor in possession after absolute alienation of the property, which naturally tends to deceive creditors, is fraudulent within the statute of *frauds* and fraudulent conveyances; and in Twyne's Case it was resolved, that the gift then in question had the *indicia* of fraud; "because the donor continued in possession, and used them as his own, and by reason thereof he traded and trafficked with others and deceived them." The decison made in Twyne's Case has been followed by almost all courts, as regards all absolute conveyances where the vendor retains possession of the personal property, and was generally applicable to chattel mortgages. There has been, in all probability, no one matter in the law that has been so thoroughly discussed as the subject of sales and mortgages of chattels without delivery of possession, with such unsatisfactory results. A mortgage being regarded as a contract of sale, the rule in Twyne's Case was adopted at an early period, as applicable to mortgages. Among so vast a number of tribunals as there are existing in this country and England, any considerable uniformity of decision can not be expected upon any important question. All men do not view the same matter alike; and the result is contrariety of decision. The general rule adopted by many courts, was that a mortgage of chattels would not be valid, unless accompanied by delivery of possession to the mortgagee,[1] treating a

[1] Hackett v. Manlove, 14 Cal. 85; Clow v. Woods, 5 S. & R. 275; Gardner v. Adams, 12 Wend. 277; Murray v. Burtis, 15 Wend. 212; Lock v. Comstock, 15 Wend. 244; Walsh v. Berkey, 1 Penn. 57; Johnson v. Jeffries, 30 Mo. 423; Portland Bank v. Stubbs, 6 Mass. 422; Gale v. Ward, 14 Mass. 352; Tucker v. Buffington, 15 Mass. 477; Badlam v. Tucker, 1 Pick. 389; Bonsee v. Amee, 8 Pick. 236; Bullock v. Williams, 16 Pick. 33; Russell v. Fillmore, 15 Vt. 130; Sturgis v. Warren, 11 Vt. 433; Woodward v. Gates, 9 Vt. 388; Meyer v. Gorham, 5 Cal. 322; Morrow v. Turney, 35 Ala. 131.

mortgage the same as an absolute conveyance, and that applying the rule in Twyne's case, it was fraudulent as to creditors; and, in some States, this is the rule at present: a mortgage, with possession retained by the mortgagor, is held good, excepting as against subsequent purchasers and creditors, unless such possession is specially provided for by the mortgage.[1]

Then came a class of cases, in which the courts sustain the doctrine, "that chattel mortgages are not fraudulent *per se*, where possession is not delivered: if the conveyance itself be in its nature valid, and such as the law gives effect to, no possession which naturally results from the design, purpose, and practical operation of that conveyance can be in its nature fraudulent, or can raise any presumption of any secret trust, beyond the import of the conveyance;[2] and still another class of cases, which establish the principle, that retention of possession is only *prima facie* evidence of fraud, and may be explained. The question in every case is, whether the transaction is *bona fide*, or whether it is a trick and contrivance to defraud creditors. In order to arrive at any conclusion upon this question of retention of possession, it must be understood that the effect of registration or filing of chattel mortgages is not now under consideration, nor the effect of the retention of possession, as affecting the rights of the mortgagor and mortgagee. A mortgage,

[1] Morrow v. Turrey, 35 Ala. 131; Hackett v. Manlove, 14 Me. 85; Johnson v. Jeffries, 30 Mo. 423; Meyer v. Gorham, 5 Cal. 322; Russell v. Fillmore, 15 Vt. 130; Sturgis v. Warren, 11 Id. 433; Woodward v. Gates, 9 Id. 358; Doyle v. Stevens, 4 Mich. 87; Constant v. Matteson, 22 Ill. 546.

[2] Conard v. Ins. Co., 7 Pet. 388; D'Wolf v. Harris, 4 Mas. 515; Mc Cowan v. Hoy, 5 Litt. 239; Snyder v. Hitt, 2 Dana, 204; Hopkins v. Scott, 20 Ala. 183; Rose v. Burgess, 11 Leigh, 186; Footman v. Pendergrass, 3 Rich. Eq. 32; Maples v. Maples, Rice Eq. 301.

fraudulent as to creditors and purchasers, is obligatory upon the parties thereto, and their heirs.[1] The question, therefore, is to be considered as affecting the rights of creditors and purchasers, irrespective of the effect of any statutory regulations, obviating a change of possession. The question, as presented by the various adjudications, as to the effect of a retention of the property mortgaged, has produced much discussion, and a great diversity of judicial opinion. The arguments, on both sides of the question, have long since been exhausted; and it is quite apparent that they never were reconciled, for they originated in different principles, and tended to different conclusions. On one side, it is attempted to make the possession of personal property absolute evidence of ownership, and all conveyances attempting to create a title inconsistent with that possession, absolutely void as against creditors and purchasers; while, on the other side, such possession is regarded only as presumptive evidence of ownership, and such conveyance *prima facie* fraudulent. The question is one of great importance. It has engaged the attention of the courts of England and America, and, while there is a seeming conflict of authority, there is less than has been supposed; and, in fact, the doctrine has been but little changed, and is now as it always has been since the Twelve Tables of Rome. The

[1] Lennox v. Notrebe, 1 Hempst. 258; Rochelle v. Harrison, 8 Port. 351; Lawton v. Gordon, 34 Cal. 36; Chapin v. Pease, 10 Conn. 69; Stores v. Snow, 1 Root, 181; Ward v. Enders, 29 Ill. 519; Findley v. Cooly, 1 Blackf, 262; Moore v. Meek, 20 Ind. 484; Welby v. Armstrong, 21 Ind. 481; Wilson v. Horr, 15 Iowa, 489; Stewart v. Dailey, 6 Litt. 212; Bull v. Harris, 18 B. Mon. 196; Ellis v. Higgins, 32 Me. 34; Harvey v. Varney, 98 Mass. 118; Stevens v. Harrow, 26 Iowa, 458; Burrows v. Alter, 7 Mo. 424; Hill v. Bank, 45 N. H. 300; Jackson v. Cadwell, 1 Cow. 622; Robinson v. Stewart, 10 N. Y. 189; Brown v. Webb, 20 Ohio, 389; Murphy v. Hubert, 16 Penn. 50; Huey's Appeal, 29 Penn. 219; Sumner v. Murphy, 2 Hill (S. C.) 488; Neely v. Wood, 10 Yerg. 486; Epperson v. Young, 8 Tex. 135; Martin v. Martin, 1 Vt. 95.

common law of England upon this subject, was based upon the civil law; and the statutes of frauds and fraudulent conveyances were but declaratory of the common law. The same has been held the common law of this country; and the statute of Elizabeth, more commonly known as the statute of frauds and fraudulent conveyances, has been substantially enacted in all of the American States. The history of the law respecting the rights of creditors, in relation to the property of their debtor, sold, assigned or mortgaged by him, but remaining in his possession, and under his control, is remarkable. It presents a perpetual struggle between a general rule of policy, intended to cut off the possibility of fraudulent or collusive sales, prescribing, either legislatively or judicially, that every sale, assignment or mortgage, unaccompanied by change of possession, should be held fraudulent in the eye of the law, and void as to creditors; and, on the other hand, the obvious hardship and injustice of numerous particular cases, where the innocent and even benevolent intention of the party was manifest, and the legal presumption of fraud appeared inequitable, oppressive, contrary to the truth of the case and the moral feelings of those who must apply and enforce the law. Thus, it happened, in England and in the United States, that, whilst the courts and the books laid down the rule broadly, and often applied it strictly, yet, first, case after case, and then class after class of exceptions, was exempted from the rule, until there were no less than twenty-four distinct grounds of exemption; and the general result of the adjudications has been to establish this doctrine,—that such want of a change of possession is not fraudulent *per se*, but only *prima facie* evidence of fraud, where it is not inconsistent with the instrument open to explanation. In the cases of chattel mortgages, where there is a stipulation in the mortgage for retention of posses-

sion by the mortgagor, it being consistent with the deed, the mortgage is not presumed to be fraudulent, but it must be proven. The question of fraud, arising in such a case, is not an absolute inference of law, but one of fact for a jury, and, unless found to be fraudulent, a mortgagee's title will prevail.[1] In New York, the burden of proof as to the *bona fides* is upon the mortgagee, and the question is one of fact, to be decided by a jury.[2] In England the doctrine in Twyne's Case has been subjected to considerable modification; and the rule of law is, though continuance in possession be, *prima facie*, a badge of fraud, if the property mortgaged be transferable from hand to hand, yet the presumption arising from that circumstance may be rebutted by explanations, showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession. The question of fraud, arising in such cases, is not an absolute infer-

[1] Martindale v. Booth, 3 B. & B. 498; Smith v. Acker, 23 Wend. 653; Cole v. White, 26 Wend. 511; Bissell v. Hopkins, 3 Cow. 166; Marsh v. Lawrence, 4 Cow. 461; Holbrook v. Baker, 5 Me. 309; Ash v. Savage, 5 N. H. 545; Bucklin v. Thompson, 1 J. J. Marsh, 223; Letcher v. Norton, 5 Ill. 575; Brooks v. Powers, 15 Mass. 24; Bartlett v. Williams, 1 Pick. 288; Holmes v. Crane, 2 Pick. 607; Wheeler v. Train, 3 Id. 255; Ward v. Sumner, 5 Id. 59; Shumway v. Butler, 7 Id. 56; Adams v. Wheeler, 10 Id. 197; Marsden v. Babcock, 2 Met. 99; Briggs v. Parkman, 2 Id. 258; Haven v. Low, 2 N. H. 13; Reed v. Jewett, 5 Me. 99; Brinley v. Springer, 7 Me. 248; Ulmer v. Hills, 8 Me. 326; Hudson v. Warner, 2 H. & G. 415; Frost v. Mott, 34 N. Y. 253; Lewis v. Stevenson, 2 Hall, 63; Russell v. Butterfield, 21 Wend. 300; Babcock v. McFarland, 43 Ill. 381; Curd v. Wunder, 5 Ohio S. 92; Fairbanks v. Bloomfield, 5 Duer, 434; Reed v. Wilmot, 7 Bingh. 577; Minshall v. Lloyd, 2 M. & W. 450; Bradley v. Copley, 1 C. B. 380; Gale v. Burnell, 7 Q. B. 850; Tapfield v. Hillman, 6 M. & G. 245; Wooderman v. Baldock, 8 Taunt. 676; Jezeph v. Ingram, Id. 838; Watson v. Williams, 4 Blackf. 26; Hawkins v. Ingalls, 4 Id. 35; Eastwood v. Brown, 1 R. & N. 312.

[2] Smith v. Hoe, 23 Wend. 653; Butler v. Vanwyck, 1 Hill, 438; Fuller v. Acker, 1 Hill, 473; Murray v. Burtis, 15 Wend. 212; Hull v. Carnley, 2 Duer, 99; Swift v. Hart, 12 Barb. 530; Bishop v. Cook, 13 Barb. 326; Cole v. White, 26 Wend. 519; Smith v. Acker, 23 Wend. 453.

ence of law, but one of fact for a jury; and if the property savor of the realty,—as the engines or machinery belonging to a manufacturing establishment,—no presumption of fraud will arise from want of delivery.[1] The controlling argument, running through the reasoning and decisions of the various courts of England and the United States, is the danger of false credit and fraudulent evasion of debt, whenever delivery and change of possession do not accompany and follow change of property, whether absolute or qualified. The cases decided furnish illustrations of this danger, and the modes in which such frauds can be effected. Their truth cannot be denied. While this is but one, and that the narrowest side of the question, it is also the fraudulent view of the matter which is most frequently, and, indeed, almost exclusively, presented to the examination of courts. But when we look at the daily business of life out of court, another aspect of this question presents itself. Mortgages of personal property: as, ships, rolling stock; the stock and implements of the mechanic or small manufacturer; the furniture of the innkeeper; assignments for the benefit of creditors, leaving the goods and debts assigned publicly to be managed and disposed of by the original owner as an agent, best acquainted with the business, and acting for the benefit of creditors, who have full confidence in his integrity,—all these have grown out of the usages of modern society, the necessities of commerce, the conveniences of daily life, the wants and usages of trade and industry. They have followed in the train of commerce,

[1] Eastwood v. Brown, 1 Ry.& M. 312; Wooderman v. Baldock, 8 Taunt. 676; Reed v. Blades, 5 Taunt. 212; Jezeph v. Ingram, 8 Taunt. 838; Hoffman v. Pitt, 5 Esp. N. P. 22; Armstrong v. Baldock, Gow, N. P. 33; Storer v. Hunter, 3 B. & C. 368; Martindale v. Booth, 3 B. & A. 498; Land v. Jeffries, 5 Rand. 21; Baylor v. Smithers, 1 Litt. 112.

credit, and enterprise. Like them, they have been largely productive of benefits to society; yet those benefits, like the results of all other human actions, are not unmixed with evil. By such means, the adventure, capacity, acquirements and industry of the young or needy have been aided and stimulated: large concerns of honorable but unfortunate merchants have been settled to the greatest advantage of the creditors, and the least possible loss of the insolvent; and the kindness of parents or the generosity of friends has been enabled to preserve the comforts of a home to the wife and children of a bankrupt, without the slightest injury or fraud—save in legal fiction—to prior creditors or subsequent purchasers. Society reaps nothing but unquestioned benefit from nine-tenths of such transactions occurring in actual life. The other tenth may come before the courts; and a majority of those impeached may, possibly, deserve to be set aside. It is not, then, at all surprising, that this different experience should give a different character to the whole in different minds.

§ 71. **Who Entitled to Possession.**—Where a stipulation in a mortgage authorizes the mortgagee, upon default of payment, to enter upon and seize the property, the mortgagor is entitled to the possession until such default.[1] Nor is a mortgage rendered invalid by having a stipulation therein, allowing the mortgagor to retain possession until the happening of a certain event,—as default in payment,—or until the mortgagee feels himself insecure.[2] Such a stipulation is personal to the mortgagor,

[1] Babcock v. McFarland, 43 Ill. 381; Leland v. The Medora, 2 W. & M. 92; Hall v. Sampson, 35 N. Y. 274; Curd v. Wunder, 5 Ohio S. 92; Fairbanks v. Bloomfield, 5 Duer, 434.

[2] Frost v. Mott 34 N. Y. 253; Letcher v. Norton, 5 Ill. 575; Hudson v. Warner, 2 H. & G. 415.

and cannot be assigned or transferred; and, in case of a sale by the mortgagor, the mortgagee is not precluded from bringing an action to recover possession of the property.[1] Many cases have been decided, in which it is held, that in the absence of any agreement or stipulation to the contrary, a mortgagee is entitled to the immediate possession of the property; the right of possession ordinarily follows that of property; and both pass under an ordinary chattel mortgage; but, when a mortgage specifically defines the circumstances under which the right of possession is to vest in the mortgagee, the law implies an intent that it is to remain in the meantime in the mortgagor.[2] While there seems to be a preponderance of authority in favor of this doctrine, I can see no just rule or principle upon which it rests. The theory upon which the adjudications are based is, that under the statute of frauds and fraudulent conveyances, retention of possession by a vendor, after an absolute sale is, *per se*, fraudulent; and these courts see or draw no distinction between absolute sales and mortgages. It is a well-settled principle of law, that retention of possession by a mortgagor is not fraudulent; it being consistent with the nature of the transaction. And there is reason and justice in this rule. A party, in executing a mortgage of personal property, has no more intention of making an absolute sale of it, than a mortgagee has of purchasing it. The very nature of a mortgage is that of security for a debt or loan, and contrary to the idea of a

[1] Ballune v. Wallace, 2 Rich. 80.

[2] Hall v. Sampson, 35 N. Y. 274; Hickman v. Perrin, 6 Coldw. 135; Broadhead v. McKay, 46 Ind. 595; Stewart v. Hanson, 35 Me. 506; Ferguson v. Thomas, 26 Me. 499; Brackett v. Bullard, 12 Met. 308; Foster v. Perkins, 42 Me. 168; Wolfley v. Rising, 12 Ks. 535; Kannaday v. McCarron, 18 Ark. 160; Miller v. Pancoast, 5 Dutch, 250; Martin v. Bayley, 1 Allen, 381; Harmon v. Short, 16 Miss. 433; Whistler v. Roberts, 19 Ill. 274.

# CHAPTER VII.

## REGISTRATION, RECORDING OR FILING CHATTEL MORTGAGES.

REGISTRATION LAWS, WHERE ENACTED.—OBJECT OF REGISTRATION LAWS.—SPIRIT OF SUCH LAWS.—EFFECT OF THE STATUTES.—EQUIVALENT TO CHANGE OF POSSESSION.—REGISTRATION OR CHANGE OF POSSESSION NECESSARY.—WHERE RECORD IS TO BE MADE.—WHAT IS SUFFICIENT REGISTRATION.—OF THE "LEX LOCI CONTRACTUS" AND "LEX DOMICILII."—VALIDITY OF CHATTEL MORTGAGES, WHERE THE PROPERTY IS REMOVED TO OTHER STATES AND COUNTIES.—ONE REGISTRATION SUFFICIENT.—OF THE PLACE WHERE MORTGAGES OF MOVABLE PROPERTY, SUCH AS ROLLING STOCK, ARE TO BE RECORDED.—NOTICE.—KINDS OF NOTICE.—VALIDITY, AS DEPENDENT UPON NOTICE.—MORTGAGEE REGARDED AS A PURCHASER.

§ 72. Having disposed of the matters relating to a change or retention of possession, as to its effect upon a mortgage of chattels, we now come to another equally important matter connected with the law of chattel mortgages, upon which (by express statutory provision) their validity, as regards creditors and purchasers, depends to a great extent; being regarded as a substitute for and equivalent to a change of possession. Possession of the mortgaged property being considered as evidence of fraud, it became necessary, in order to protect creditors and purchasers, as well as the mortgagee, that some rule should be adopted, by which the mortgagor might overcome this presumption, and be permitted to retain his property, and carry on his business; and creditors and others, having dealings with him, might be notified of his financial situation, and of the encumbrances upon his property;

it being, in many cases, a great hardship upon a debtor to be compelled to deliver possession of the very property by which he not only obtained his own livelihood, but the means of satisfying the debt for which the property was security. In order to obviate these difficulties, without changing or affecting the rights of parties,—that is, purchasers and creditors,—the various State legislatures have enacted laws requiring chattel mortgages, in all cases where possession is not delivered to the mortgagee, to be registered or filed for record in the town or county where the mortgagor resides, or the property is situated. Statutes requiring either delivery of possession, or registration in lieu of possession, have been adopted in the following States and Territories: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virignia, West Virginia, Wisconsin and Wyoming. In this respect, chattel mortgages closely resemble mortgages of real estate.

§ 73. **The Object of Registration.**—At common law, and prior to the adoption of local statutes providing for the registration or filing of chattel mortgages, transfers of chattels, without some change of possession, actual or symbolical, were regarded by courts as a species of fraud upon creditors, by permitting a debtor to appear as the absolute owner of the property, and thereby obtaining all the advantages resulting therefrom. The object of the statutory provisions requiring the filing or registration of mortgages, is to protect creditors and purchasers

from prior secret conveyances, and to give them notice of the existence of a mortgage, when the mortgagor retains possession of the property. If the actual possession of the property is changed, then the necessity for recording or filing the mortgage fails. It was also intended that speedy information should be given to every person of any transfer of personal property, when the party transferring retained possession; and that such possession, unless the provisions of such statutes were complied with, as to creditors and subsequent purchasers, defeated such transfer. The manifest design of the law-making power was not only to give the public notice of the existence of the encumbrance, but the precise amount thereof. The statutes requiring chattel mortgages to be filed or recorded, did not repeal the statutes concerning fraudulent conveyances. They only added another to the grounds upon which a chattel mortgage will be declared void. The object of such statutes was to create an additional official guard against fraud and collusion, by requiring the mortgage, or a copy thereof, to be filed or recorded. A compliance with the statute does not rebut the presumption of fraud. A mortgage may be recorded or filed, and still be fraudulent as to creditors, where the mortgagor retains possession. Nor will it excuse the mortgagee, who claims under the instrument, from affirmatively showing, where there is no change of possession, that the mortgage was made in good faith, and without any intent to defraud creditors or purchasers. The effect of the act is to require the party, in addition to such proofs, to show that the statute has been complied with; thus preventing subsequent creditors and others from claiming that their rights accrued without notice of any such encumbrance, and that it is, for that reason, void as to them. A mortgage is a real right, a *jus in re*, which, in general, so far

as the rights of third persons are concerned, can only be created by an observance of the forms of law. Where possession is not delivered, it should be recorded or filed, in strict conformity with the statutory provisions. The statutes prescribe the manner in which they should be executed and registered, and must in general be complied with; and where a mortgage is defective, by reason of a non-compliance with a statutory provision, it is void as to creditors.[1] Where a mortgage has been recorded, it will be presumed to have been registered, as the law requires.[2]

§ 74. The spirit of the registration system requires that the record of the mortgage should disclose, with as much certainty as the nature of the case will admit of, the real state of the encumbrance. Hence, if the mortgage be given to secure an ascertained debt, the amount of that debt must be stated. If it is intended to secure a debt not yet ascertained, such data must be given, respecting that debt, as will put anyone interested in the inquiry upon the track leading to a discovery. If given to secure an existing or future liability, the foundation of such liability must be set forth.[3] The whole system is a mere statute of notice; and a compliance with the registration laws will not, of itself, be evidence of the execution of a mortgage, in good faith. It is simply notice that there is such an instrument; and any creditor, who has notice of such a prior conveyance, cannot be allowed to set up the plea of fraud, on account of the retention of possession; for the registration gives as full notice as the change of possession.

§ 75. **Change of Possession Effected by Registration.**—Registration or filing of chattel mortgages,

[1] Hill v. Tillman, 39 N. H. 88.
[2] Hall v. Tunnell, 1 Houst. 320.
[3] Hart v. Chalker, 14 Conn. 77.

where provided for by statute, is equivalent to actual delivery of the property, but not in all States.[1] The necessity of delivery of possession to the mortgagee, or of a record, is wholly the effect of statutory regulation. At common law, a mortgage of personal property might be valid in the absence of fraud, even against subsequent *bona fide* purchasers and attaching creditors, although the mortgagor remained in possession, and although no record of the mortgage existed.[2] Personal property passing by delivery, and possession being the ordinary test of ownership, he who contracts for an interest in such property, by way of mortgage, and neglects to complete his title by taking possession, or,—what is deemed equivalent thereto,—by registering or filing his mortgage, as provided by statute, must take the consequences of thus enabling the mortgagor to hold himself out as the apparent owner, when he has ceased to be the real owner. The statutes requiring a mortgage to be filed or recorded ,are the only laws subjecting mortgagees to any risk for not recording or filing their mortgages.[3] Between mortgagor and mortgagee, a chattel

[1] Horton v. Williams, 21 Minn. 187; Robinson v. Elliott, 22 Wall. 513; Bank v. Hunt, 11 Wall. 391; Barker v. Hall, 13 N. H. 298; Bunce v. Smith, 3 H. & J. 499; Boyard v. Yardley, 11 Miss. 302; Hughes v. Cory, 20 Iowa, 399; Forbes v. Parker, 16 Pick. 462; Smith v. Shaw, 25 Me. 555; Shurtliff v. Willard, 19 Pick. 211; Bullock v. Williams, 16 Pick. 24; Leland v. Medora, 2 W. & M. 103; Kuhn v. Graves, 9 Iowa, 303; Miller v. Whitson, 40 Mo. 97; Meech v. Patchin, 14 N. Y. 71; Clow v. Woods, 5 S. & R. 295; Walsh v. Baker, 1 Penn. 57; Goodenow v. Dunn, 21 Me. 86; Donaldson v. Johnson, 2 Chand. 160; Call v. Gray, 37 N. H. 428; Sanders v. Pepoon, 4 Fla. 465; Tyler v. Strang, 21 Barb. 98; Harrington v. Brittain, 23 Wis. 541; Hambelon v. Hayward, 4 G. & J. 433; Smith v. McLean, 24 Iowa, 322; Foster v. Beall, 1 H. & J. 31.

[2] Holbrook v. Baker, 5 Me. 309; Bissell v. Hopkins, 3 Cow. 166; Bucklin v. Thompson, 1 J. J. Marsh. 223; Letcher v. Norton, 5 Ill. 575; Ash v. Savage, 5 N. H. 545; Homes v. Crane, 2 Pick. 610.

[3] Hardaway v. Semmes, 24 Ga. 305.

mortgage is valid without change or delivery of possession or registration, and therefore binding on the administrator of the mortgagor.[1] And such a mortgage will be valid as against all claiming under the mortgagor, or against any other title inferior to it, except a mortgage or sale from the mortgagor, which is recorded prior thereto.[2] As to subsequent purchasers and creditors of the mortgagor, without notice of the existence of the mortgage, the mortgagee must either have and retain possession of the mortgaged property, or the mortgage must be filed or recorded as provided by law.[3]

§ 76. **Registration, Filing or Delivery of Possession, Requisite to the Validity of a Mortgage as against Creditors.**—In order to prevent the owner from keeping up an assumed credit, and placing fraudulent encumbrances on his property, to prevent its being used in the satisfaction of his debts, the statutory enactments in the various States require, as one of the essential ingredients of good faith in the mortgaging or encum-

[1] P. & M. Bank v. Willis, 5 Ala. 770; Mauldin v. Terrell, 14 Ala. 814; Tuesley v. Robinson, 103 Mass. 558; Killough v. Steele, 1 S. & P. 262; Ross v. Ross, 21 Ala. 322; Andrews v. Burns, 11 Ala. 699; Leinz v. Will, 1 Dall. 430; Fox v. Clark, Walk. Ch. 535; Claggett v. Salmon, 5 G. & J. 314; Smith v. Moore, 11 N. H. 55; Winsor v. McLellan, 2 Story, 492; Hall v. Snowhill, 2 Green, 8; Main v. Alexander, 9 Ark. 122; Leggett v. Bullock, Busb.L. 283; Fosdick v. Barr, 3 Ohio. S. 471; DeVendal v. Malone, 25 Ala. 272; Moses v. Walker, 2 Hilt. 536; Johnson v. Jeffries, 30 Mo. 423; McTaggart v. Rose, 14 Ind. 230; Fuller v. Page, 26 Ill. 358; Perdue v. Aldridge, 19 Ind. 290; Lockwood v. Slevin, 26 Ind. 124; Forest v. Tinkham, 29 Ill. 141; Moore v. Thomas, 1 Oregon, 201; Nice's Appeal, 54 Penn. 280; Warren v. Magdalen Co., 1 Rol, 169; Martindale v. Booth, 3 B. & A. 505; Jones v. Yates, 9 B. & C. 532; Roberts v. Roberts, 2 B. & A. 369.

[2] Fox v. Clark, Walk. Ch. 535; Claggett v. Salmon, 5 G. & J. 314; Youngblood v. Keadle, 1 Strobh. 121.

[3] Smith v. Moore, 11 N. H. 55; McFadden v. Turner, 3 Jones, L. 481; Sheldon v. Conner, 48 Me. 584; Rich v. Roberts, 48 Me. 548.

bering of personal property, that such instruments be in writing, and that, in the absence of the delivery of the property to the mortgagee, the instrument be duly recorded or filed. The statutes require either a registry or a delivery of the goods, where the rights of others than the parties to the instrument are to be affected.[1] The same rule applies to absolute, conveyances—such as bills of sale,—where there is a defeasance separate from the conveyance.[2] It is not necessary that possession should be taken of the property by the mortgagee, and the mortgage be filed or recorded. The statutes require that one of the two provisions be complied with; and if delivery of possession accompanies the mortgage, it need not be registered;[3] as a mortgage is valid and binding between the parties without record, it can only be made effectual as to creditors, purchasers, and strangers from the time that they have, or are presumed to have, obtained notice of the existence of the mortgage, either by ascertaining that the mortgagee is in possession, or that the mortgage has been executed in accordance with the statutory requirements, and duly filed or recorded. So that it can take effect only from the date of its registration.[4] While the

[1] Bond v. Newburn, 1 Brock, 316; Lee v. Huntson, 1 Hoff. Ch. 447; Hodgson v. Butts, 3 Cranch, 138; McGregor v. Hall, 3 Stew. & P. 397; Gregg v. Sandford, 24 Ill. 17; Forest v. Tinkham, 29 Ill. 141; Henderson v. Morgan, 26 Ill. 431; Ogg v. Randolph, 4 H. & M. 445.

[2] Duke v. Jones, 6 Jones L. 14; Lobban v. Garnett, 9 Dana, 389.

[3] Bryant v. Gordon, 11 Mich. 531; Lee v. Huntoon, 1 Hoff. Ch. 447; Parshall v. Eggart, 52 Barb. 367; Humphries v. Bartel, 18 Miss. 282.

[4] Smith v. Smith, 24 Me. 555; Morrill v. Sandford, 49 Me. 566; Holliday v. Franklin Bank, 16 Ohio, 533; Gregg v. Sandford, 24 Ill. 17; Tate v. Brittain, 3 Hawks, 55; Davidson v. Beard, 2 Hawks, 520; Sheldon v. Conner, 48 Me. 584; Rich v. Roberts, 48 Me. 548; White v. Denman, 1 Ohio S. 110; Work v. Harper, 24 Miss. 517; Westcott v. Gunn, 4 Duer, 107; Wilson v. Leslie, 20 Ohio, 161; Benedict v. Smith, 10 Page, 126; Bank of Ky. v. Vance, 4 Litt. 168; Ogg v. Randolph, 4 H. & M. 445; Woodruff v. Robb, 19 Ohio, 212; Byram v. Gordon, 11 Mich. 531; Folsom v. Clemence, 111 Mass. 273.

validity of a chattel mortgage is by statute made dependent upon certain prerequisites, a mortgage is not void *in toto* by reason of an omission to comply with such statute on the day the mortgage is executed. In Indiana, it must be filed for record within ten days from the day of its execution.[1] With this exception, there is no special time fixed in which it must be recorded; and, therefore, it can only take effect as against creditors and others from the time it is left or deposited for record. From such time until its lien expires by statute or payment, it is effectual against all the world, except so far as it may be void for fraud.[2] Where a mortgage is not placed of record, while it is void as to creditors, a wrong-doer or trespasser cannot take advantage of that fact: it is as valid and binding upon him as it is upon the mortgagor; and the mortgagee may maintain an action of trespass or replevin against any one who, without any title, takes the property from the possession of the mortgagor; statutes relating to fraudulent conveyances do not apply to such cases.[3] Want of registration can only avail in favor of a creditor, subsequent mortgagee or purchaser, *bona fide*, in ignorance of such unrecorded mortgage in many states; and if he sets up that defense, he must deny notice, whether alleged in the bill or not.[4]

§ 77. **Where Chattel Mortgages are to be Recorded.**—In order to give notice to all parties dealing with a mortgagor, the statutes regulating mortgages of personal property require that they be filed or recorded at

[1] Cherryworth v. Dailey, 7 Ind. 284.

[2] Wilson v. Leslie, 20 Ohio, 161.

[3] Pratt v. Harlow, 16 Gray, 379; Moses v. Walker, 2 Hilt. 536; Hackett v. Manlove 14 Cal. 85; Johnson v. Jeffries, 30 Mo. 423; Morrow v. Turney, 35 Ala. 131.

[4] De Vendal v. Malone, 28 Ala. 272; Craigin v. Carmichael, 11 B. R. 511.

the town or in the county where the mortgagor resides; this being a means of affording speedy information to all who may desire to examine the records as to the amount and extent of encumbrances. In the case of a corporation, which must have its residence, the same as a natural person, the rule is, that the principal office within a State of the corporation mortgagor, and not the place where the property is located, determines the town or county of its residence.[1] A mortgage must be recorded at the place where the mortgagor resides;[2] and where there are several joint-owners, residing in different towns or counties, a mortgage will be invalid as against other persons than the mortgagors, unless it is recorded in each of the towns or counties where the mortgagors reside.[3] A record of a mortgage at the place where the mortgagee resides, which is not the residence of the mortgagor, is invalid.[4] A mortgage must be recorded in strict conformity with the statutory requirements, in order to be of any validity against creditors.[5] A mortgage of wood or standing timber, by one not the owner of the land, is a mortgage of personal property; and where such a mortgage is recorded among real estate mortgages, it is invalid; it must be filed as a chattel mortgage.[6] But where a mortgage is made of real estate and personal property, such as fixtures or machinery in a mill or manufactory, and such mortgage is recorded in the book of mortgages of land, there being no statutory requirement as to this class of mortgages, such a record was held sufficient.[7] To save all question, such a mortgage, where there are separate

[1] Wright v. Bundy, 11 Ind. 398.

[2] Henderson v. Morgan, 26 Ill. 431; Hicks v. Williams, 17 Barb. 523; Bevans v. Bolton, 31 Mo. 437.

[3] Morrill v. Sandford, 49 Me. 566; Rich v. Roberts, 50 Me. 395.

[4] Stowe v. Meserve, 13 N. H. 46.

[5] McCutchin v. Platt, 22 Wis. 561.

[6] Douglass v. Shumway, 13 Gray, 498; Claflin v. Carpenter, 4 Met. 580.

[7] Anthony v. Butler, 13 Pet. 423.

books for recording chattel and real mortgages, should be recorded in each book, both as a chattel and real estate mortgage. But where the recorder's or register's office is the same for both classes of mortgages, and the same indexes are used in referring parties to the conveyances in such county, and a conveyance is made of real and personal property, so blended in the mortgage as to be inseparable,—as, a manufactory and all its machinery,—a record of such as a mortgage of realty may be sufficient notice to creditors. But where there are separate books, and mortgages are merely filed, not recorded at length, such construction could not be held applicable; the line of distinction between real and personal property being clearly drawn. All men are able to distinguish between real and personal property; and, as a natural consequence, in looking for liens upon any property except land, the records of chattel mortgages alone would be searched; and, as notice to creditors is all that is intended, such mortgages should be so recorded that the object and requirements of the law will be complied with.

§ 78. **What is a Sufficient Filing or Record.**—A mortgage being recorded or filed for the express purpose of notifying parties of its existence, we must learn what is a sufficient compliance with the statute, in order to have the required effect as notice; a mortgage being valid between the parties, without delivery or change of possession or record, and invalid as to creditors. The general rule is, that recording being equivalent to change of possession, the mortgage takes effect as to creditors whenever it is recorded. In order to settle the rights of parties claiming under conflicting or successive conveyances, and in hostility thereto, the registration laws provide that, when conveyances are left with the proper offi-

cer for record, he shall note the day and hour of their delivery to him; and from such time, the law considers them filed or recorded: so that, as to creditors, a mortgage takes effect from the time of its delivery to the recorder.[1] So that, to all intents and purposes, a mortgage is a record from the time it is filed for record, and is notice to subsequent encumbrancers, creditors, and purchasers. That it should be actually spread out on the record, is not essential; a note in the entry or receiving book of the register or recorder of the time of its reception and delivery to him, is sufficient.[2] An omission on the part of the register to note the time of its receipt, or a mistake made by him in copying, as to the sum secured, or its date, cannot prejudice the mortgagee.[3] But a mortgage which is merely delivered to the register, with orders not to record it until further notice, and is not in fact recorded, cannot be considered as recorded, if the notice has not been given; even though the clerk has noted thereon, and in the receiving-book, the time of its delivery to him.[4] But where it is delivered and recorded, the register's certificate on the mortgage of his receipt of it for record at the time stated, proves the fact; and the further entry in the receiving-book under the same date, proves that it was so recorded, and is conclusive as between the mortgagee and a creditor attaching the property subsequently to the time stated in the certifi-

[1] Magee v. Bentley, 8 Ohio, 396; Doe v. Bank, &c., 3 McLean, 140; Brown v. Kirkman, 1 Ohio S. 116; Fosdick v. Barr, 3 Ohio S. 471; Carnall v. Duvall, 22 Ark. 136; Tousley v. Tousley, 5 Ohio S. 78.

[2] Curtis v. Lyman, 24 Vt. 338; Kessler v. State, 24 Md. 313; Craig v. Dimmock, 47 Ill. 308; Brooke's Appeal, 64 Penn. 127; Jordan v. Farnsworth, 15 Gray, 417; Fuller v. Rounceville, 31 N. H. 512; Holmes v. Sproul, 31 Me. 73; Head v. Goodwin, 31 Me. 181; Handey v. Horne, 22 Me. 560; Dodge v. Potter, 18 Barb. 193.

[3] McLaren v. Thompson, 40 Me. 561; Mims v. Mims, 35 Ala. 28; Partridge v. Swazey, 46 Me. 414.

[4] Town v. Griffith, 17 N. H. 165.

cate.[1] The index constitutes no part of the record; and it is not essential that it be indexed, in order to make the record effective to charge subsequent purchasers with notice.[2]

§ 79. **Of the "Lex Loci Contractus" and "Lex Domicilii."—Of the Effect of the Removal of Mortgaged Property beyond the County or State where the Mortgage is made.**—As we have already shown, that the whole object in requiring a change of possession under a chattel mortgage was to create and establish a rule in regard to this species of conveyances, by which all parties interested in the subject-matter might be notified of its liability or non-liability for the debt of its owner,—the various enactments known as registration laws or acts, providing for filing and recording of conveyances, being, to a great extent, a substitute for delivery of possession, have provided an effectual system of notice to all parties having transactions with the mortgagor of the extent and amount for which his property is held as security, and subject to the lien of a mortgage. That the registration of a chattel mortgage would be as effectual as a mortgage of real estate to all persons in the town or county where registered, there can be no doubt; and if mortgagors could be compelled to remain at the place where the mortgage was executed, or keep the mortgaged property within the town or county where the instrument is registered until the mortgage is satisfied, and the property released, the question as to the effect of such transactions would be confined to the parties to the instrument and those in the immediate locality.

[1] Tracy v. Jenks, 15 Pick. 465; Ames v. Phelps, 18 Pick. 314; Head v. Goodwin, 31 Me. 181.

[2] Curtis v. Lyman, 24 Vt. 338; Green v. Carrington, 16 Ohio S. 548.

The necessities of trade and commerce, and the facilities offered by the rapid means of transit from one portion of the globe to another, afford the means of the speedy removal of the owner, as well as the property mortgaged. It becomes necessary to ascertain the effect of such transactions, not only in the place where executed, but in the whole civilized world. It is not within the scope or purpose of this work to treat of the effect of such removal upon all classes of contracts, nor the rights of parties thereunder. As far as the adjudications settle the rights of mortgagees and others, we will endeavor to examine them. A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere, *jure gentium*, and, by tacit assent, the *lex loci contractus* controls the nature, construction and validity of the contract; and on this broad foundation, founded on necessity and commercial convenience, it is said to have been originally established. *Ex hoc jure gentium omnes pœne contractus, introducti sunt usu exigente et humanis necessitatibus.* It is a general principle, applying to contracts made, rights acquired, or acts done, relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it, and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the mode of execution and authentication of the form or instrument of contract; and also, in relation to the use and meaning of the language in which it is expressed,—the construction and interpretation of it; the legal duties and obligations imposed by it, and the legal rights and immunities acquired under it. Personal property has no place, no *sequelam*, in the language of the civil law,—*mobilia inhærent ossibus domini.* Contracts in regard thereto, are to be construed according to the *lex loci contractus.* If the contracts relate to immov-

ables, or what the law calls real property, they are construed according to the *lex loci rei sitæ.* The *lex loci contractus aut actus* determines the nature and validity, obligation and legal effect of such contracts, and furnishes the rule of construction and interpretation.[1] The general principle is, that personal property has no locality or *situs*, but follows the person of the owner; and his alienation of it is governed by the law of his domicile, or where it was made; and this rule is generally recognized

[1] Carnigee v. Morrison, 2 Met. 381; Bulger v. Roche, 11 Pick. 31; Blanchard v. Russell, 13 Mass. 1; Atwater v. Walker, 1 Green, 42; Vancleef v. Thorason, 3 Pick. 12; Smith v. Smith, 2 Johns. 235; Ruggles v. Keeler, 3 Johns. 263; Whittemore v. Adams, 2 Cow. 621; Warren v. Lynch, 5 Johns. 239; De Sohe v. De Laistre, 2 H. & J. 291; Ayres v. Audubon, 2 Hill, (S. C.) 601; Loan Co. v. Towner, 13 Conn. 249; Watson v. Brewster, 1 Penn. 381; Watson v. Orr, 3 Dev. 161; Martin v. Martin, 9 Miss. 176; Thayer v. Elliott, 16 N. H. 102; Pope v. Nickerson, 3 Story, 165; Farmers' Bank v. Burchard, 33 Vt. 346; Cox v. Adams, 2 Ga. 158; Dundas v. Bowles, 2 McLean, 397; Bliss v. Houghton, 13 N. H. 126; Hayward v. LeBarron, 4 Fla. 404; Dakin v. Pomeroy, 9 Gill, 1; Pomeroy v. Ainsworth, 22 Barb. 118; McAllister v. Smith, 17 Ill. 328; McDougal v. Rutherford, 30 Ala. 253; Walker v. Forbes, 31 Ala. 9; Skelton v. Marshall, 16 Tex. 354; Evans v. Kittrall, 33 Ala. 349; Brown v. Freeland, 34 Miss. 181; Bliss v. Brainerd, 41 N. H. 256; Hill v. Pine River Bank, 45 N. Y. 300; Cole v. Brown, Dudley, (S. C.) 7; Speed v. May, 17 Pa. St. 91; Middlebrook v. Merchants' Bank, 41 Barb. 481; Bank of U. S. v. Donnelly, 8 Pet. 361; Sessions v. Little, 9 N. H. 271; Dunscombe v. Bunker, 2 Met. 8; Boyd v. Ellis, 11 Iowa, 97; Newman v. Kershaw, 10 Wis. 393; Livermore v. Jenks, 21 How. 126; Born v. Shaw, 29 Penn. 288; Balt. &c. R. R. v. Hoge, 34 Penn. 214; Moore v. Willett, 35 Barb. 613; Van Buskerk v. Warren, 39 N. Y. 119; Cage v. Wells, 7 Humph. 195; Speed v. May, 17 Penn. 91; Ackerman v. Cross, 40 Barb. 165; Frazier v. Fredericks, 4 Zab. 162; Richardson v. Leavitt, 1 La. 430; Russell v. Fenno, 11 Rich. 303; Hanford v. Paine, 9 A. & R. 553; Caskie v. Webster, 2 Wall. Jr. 131; Robinson v. Rapelye, 2 Stew. 86; Law v. Mills, 18 Penn. 185; U. S. v. Bank of U. S., 8 Rob. (La.) 262; Mowry v. Cocker, 6 Wis. 596; Newman v. Bagley, 16 Pick. 570; Bholen v. Cleveland, 5 Mason, 174; W. S. Bank v. Huth, 4 B. Mon. 423; Walters v. Whitlock, 9 Fla. 86; Means v. Hapgood, 19 Pick. 105; Green v. Mowry, 2 Bailey, 163; Houston v. Newland, 7 G. & J. 480; West v. Tupper, 2 Bailey, 193.

by the comity of nations. The principle is founded in an enlarged policy, growing out of the transitory nature of personal property, and the general convenience of nations. In accordance with the general principle above stated, the law of the place of domicile must, in all cases, determine the validity of every transfer or other disposition of personal property by the owner.[1] Therefore, in accordance with this general principle, applicable to personal property, the *lex loci contractus aut actus* is the *lex domicilii*. As the statutes of the various States prescribe the requirements necessary to the validity of chattel mortgages, a mortgage executed in conformity with such statutory provisions as to recording, filing, acknowledgment, etc., and valid by the laws of the State where executed, is valid in every other State, county or township in which the mortgagor may remove to, or the property be taken, though not executed conformably to the laws of such State, and not recorded there.[2] The constructive notice imparted by the record of a chattel mortgage extends to

[1] Turner v. Fenner, 19 Ala. 355; Johnson v. Copeland, 35 Ala. 521; Bridgeport Bank v. N. Y. &c. R. R., 30 Conn. 231; Warren v. Hooper, 13 Ind. 167; Thomas v. Tanner, 6 T. B. Mon. 52; Foulke v. Fleming, 13 Md. 392; Swearingen v. Morris, 14 Ohio S. 424; Noble v. Smith, 6 R. I. 446; Holmes v. Remsen, 4 Johns. Ch. 460; Stent v. McLeod, 2 McCord, Ch. 354; Allen v. Bain, 2 Head, 100.

[2] Ferguson v. Clifford, 37 N. H. 86; Jones v. Taylor, 30 Vt. 42; Wilson v. Carson, 12 Md. 54; Langworthy v. Little, 12 Cush. 109; Dobbin v. Hewett, 19 La. An. 513; Griffin v. Griffin, 18 N. J. Eq. 104; Smith v. McLean, 24 Iowa, 322; R. I. Bank v. Danforth, 14 Gray, 122; Taylor v. Boardman, 25 Vt. 581; Barker v. Stacey, 25 Miss. 471; Tucker v. Toomer, 36 Ga. 138; Ballard v. Winter, 39 Conn. 179; Cobb v. Buswell, 37 Vt. 333; Ætna Ins. Co. v. Aldrich, 26 N.Y. 92; Martin v. Hill, 12 Barb .631; Kanaga v. Taylor, 7 Ohio S. 134; Offutt v. Flagg, 10 N. H. 46; Runyon v. Groshorn, 1 Beasley, 86; Morse v. Powers, 17 N. H. 286; Olson v. Nelson, 3 Minn. 53; Fishburne v. Kunhardt, 2 Speers, 556; Hoit v. Remmick, 11 N. H. 285; Barrows v. Turner, 50 Me. 127; Bingham v. Weaver, 6 Cush. 298; Whitney v. Haywood, 6 Ill. 82; Bevans v. Bolton, 31 Mo. 437; Bowman v. McKleroy, 14 La. 587; Hardaway v. Semmes, 38 Ala. 657; McKeithan v. Butler, 2 Rich. Eq. 37.

whatever county or State the property may be removed to.[1] In order to have this effect, and to sustain such a mortgage, it must be shown to be valid by the *lex loci contractus*.[2] In the absence of any proof, it will be presumed that the common law obtains there.[3] In such cases, the common-law principles will govern its effect, or the law will be presumed to be the same as that which governs the tribunal where the question arises.[4] In Kansas, and perhaps in other States, one of the statutory provisions in regard to registration requires that, where the parties are non-residents, and the property is within the State, the mortgage must be filed where the property is located; and where the mortgagor and mortgagee were residents of Missouri, the mortgage was recorded there, but the property was in Kansas at the time of the execution of the instrument, and the property was described in the mortgage as being there, it was held invalid as to creditors of the mortgagor.[5] The distinction between this case and those cited *supra* is, that at the time of the execution of the mortgage, the property was beyond the jurisdiction of the State where the mortgage was executed; while, in the other cases cited, the property was in the State and place where the mortgages were registered at the time they were made. Another point upon which the Kansas case was decided, was the invalidity of the mortgage, on the ground of the insufficiency of the description of the property. Had the mortgaged property been in the State of Missouri when the mortgage was executed and filed, and if the mortgage had been valid

[1] Smith v. McLean, 24 Iowa, 322.
[2] Blystone v. Burgett, 10 Ind. 28.
[3] Beal v. Williamson, 14 Ala. 55.
[4] Russell v. Turner, 11 Rich. 302; Beirne v. Patton, 17 La. 589; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Green v. Trieber, 3 Md. 11; Sangston v. Gaither, 3 Md. 40: Savage v. O'Neil, 43 N. Y. 248; Ferguson v. Clifford, 37 N. H. 86.
[5] Golden v. Cockrill, 1 Kans. 259.

under the laws of that State, it must have been held valid in Kansas, if the description of the property had been sufficiently definite to notify parties as to the exact property encumbered. Where the instrument is valid in the State where it is executed and registered in accordance with the statute, and the mortgagor, before breach of condition or default, removes it out of the State, and disposes of it, or encumbers it, without giving notice of the mortgage, his action will not deprive the mortgagee of any rights, unless there is fraud or collusion shown. The mortgagee is entitled to enforce his mortgage, and obtain the same relief that he would be entitled to in the State where the contract was made. He may follow the property wherever it may be taken, and enforce his rights. It is a general rule of international law, that the rights of a party to a contract, as distinguished from the remedies, are to be determined by the law of the place where the contract is to be performed. But where a contract is declared void by the law of the State or county where it is made, it cannot be enforced in any other State. So, if the law of the State or place of contract is in conflict with the system of jurisprudence, or contravenes the policy of the State where the remedy is sought, there is no rule of comity or international law which imposes on such foreign tribunal any duty to enforce such contract.

§ 80. **Of the Place where Mortgages of Movable Property, such as Rolling Stock, are to be Recorded.**—As we have examined the effect of the *lex loci contractus* upon the validity and effect of mortgages, where the rights of mortgagees are to be enforced in different States, we will consider the question as to where mortgages of property that is in constant transit from county to county, from State to State, and, in fact, from

the necessities of trade being moved in the usual and ordinary course of business, from the Atlantic to the Pacific coast, are to be recorded. As we have arrived at the conclusion that rolling stock is personal property, and, therefore, subject to encumbrances, as other chattel property, its nature requires the establishment of some rule in regard to the rights of parties under a mortgage of it. The building, equipping, and management of railroads requiring more capital than is usually possessed by any one person, a number of persons generally associate themselves together under the laws of a State, or by special charter, as a corporation for the purpose of constructing and operating such railroad. The line, when constructed, may be within the territorial limits of one county or State, or it may extend through half a dozen. Its rolling stock is used on its own road, and, perhaps, every other with which it connects or transacts business. A railroad in Massachusetts may have portions of its rolling stock in California. Under the present American system of railways, cars are loaded at a point on the Atlantic coast, and are taken over as many different and distinct roads as there are States between such initial point and the destination of its load. The rolling stock may be in the possession of its owner one day or week; and it may be months or years before it is returned, or even brought within the jurisdiction of the State where the corporation is located. Under such a state of circumstances, it becomes necessary to ascertain the rights of mortgagees and creditors. A corporation has, like a natural person, a place of residence. The general rule is, that the place where its main office or place of business is located is its residence. And the question as to the effect of the registration of a mortgage, at such place, is by no means settled. In regard to the

registration of mortgages, whether of real or chattel property, the law makes no distinction. In case of real property, being immovable, the laws require registration in the county where the land is situated,—that being the place where all conveyances thereof are recorded. In the case of personal property, having no locality, except that of its owner, who is presumed to be in the possession and control of it, its situation is presumed to be with him; and registration is required at the place of his residence, if his property is in some distant State or part of the State: so that he would come under the term *non-resident*, and his property would be amenable to the jurisdiction of a court having no jurisdiction over his person; in such cases, the law makes no distinction between personal and real property; and a mortgage, in order to be valid, must be registered where the property is situated. That this provision is a salutary one, there can be no doubt; but that it would be applicable to a railway corporation, whose business compels it to keep the greater portion of its personal property in constant transit from one part of the country to another, is a matter of grave doubt. The registry and recording acts, when applied to the protection of purchasers and creditors, as far as the same relate to chattel mortgages and the requirements necessary for their renewal, are matters of statutory precaution for the prevention of fraud, in giving notice to all persons of the encumbrances upon the property. One of the requirements, that the mortgage be recorded at the residence of the owner, or, if a non-resident, at the place where the property is situated, is a question that is not easily disposed of as to rolling stock. If the residence of a corporation is at the place of its organization, or where its principal office is located for the general transaction, management and supervision of its affairs,—and its prop-

erty were to remain there or in the county where its office is located, there could be no question as to notice. And a levy or sale, under an execution in such county, would only be of the equity of redemption or right of possession until a forfeiture by entry or foreclosure; but the nature and scope of its business is not such as to permit this: it may, as in case of many roads, have a line extending through numerous counties; it may be located in several States. Can it be said that, in order to protect the mortgagee, he must follow the property, file his mortgage in every county and State, and, if the rolling stock is, as is often the case, used on roads hundreds of miles from the line of the company owning the stock, and in other States where the execution of final process is governed by other statutes, that he must follow every one of the numerous portions of that rolling stock, and file a record of his mortgage in every town or county where it may happen to be. Take the case of one of the numerous railway equipment companies, located in some city or town, on the line of some great railroad. In order to fulfil some contract, it needs money; and, in order to obtain it, executes a chattel mortgage on fifty or more cars, which are in its shops, and under its possession and control at its place of residence, at the time when the mortgage is executed, but are subsequently sold or leased; or a case like this: A. has a mortgage on the property of the Boston and Maine railroad. Said mortgage includes the road-bed, iron and rolling stock; its freight cars, to the number of a hundred, are loaded; and in the ordinary course of business the cars, being loaded with through-freight, are transferred over twenty different roads to San Francisco: a creditor of the company, being there, and having a judgment, or commencing an action by attachment, levies on the rolling stock, it being a non-

resident or foreign corporation,—that being a cause for attachment,—recovers judgment and sells the property,—has the mortgagee to follow that rolling stock to San Francisco, and record his mortgage there, and at all the intermediate points between Boston and that place, in order to protect his lien on the property? This may seem an extreme case; but it is one of daily and constant occurrence, under the American system of railway management. It is, therefore, necessary to adopt some uniform system,—some principle that shall govern every case as it arises, whether it be in different towns, counties or States, in regard to notice. The rule that personal property follows the owner, and is taxable wherever the owner is, may be a safe rule in questions of taxation; but can it be in a question of this kind? Proceedings subjecting property to sale on execution upon judgments *in rem*, are founded upon the location of the property, regardless of the domicile or residence of the owner, where the auxiliary remedy of attachment secures the property for the satisfaction of such judgment. What, then, can be adopted as a fair and just method of imparting notice to parties dealing with movable property, like the rolling stock of a railroad, where it travels from one jurisdiction to another, with a speed only known to such corporations, is a question yet to be determined. In New York, the doctrine is established, that registration in every county on the line of the road is necessary,—that it is a resident of every such county. While a railway company may be liable to suit in every county or township through which its road passes, that fact does not make it a resident of every such town or county. Almost every kind of corporation transacting business beyond its home-office and in distant States, may sue and be sued; but this does not make it a resident of such State, nor require a chattel

mortgage made at its home-office to be recorded in such foreign State, because it sends portions of its property to be used there in its business, after the mortgage is made. While this question of registration depends in a great measure upon State legislation, the *jus gentium* has established the doctrine, that the *lex loci contractus* must govern. The various State courts have assented to and affirmed this doctrine; and, if it is applicable to citizens of different States, is it any less so to citizens of different counties of the same State? The courts in New York do not require a chattel mortgage to be recorded in any county in which the property may be taken, or the mortgagor may remove to; nor do the laws of any other State require it. One registration, in conformity with the statute, is sufficient as to individuals: is it any less so as regards corporations? So that, applying the principles of the law of nations, and the doctrine as established between individuals, the execution of a chattel mortgage by a railway corporation of rolling stock, if filed or registered, as required by the law of the State where executed, will be valid in every other State wherever the property may be.

§ 81. **Of Notice.**—The validity of a chattel mortgage as to all persons except the parties to the instrument, depends upon a strict compliance with the statutory requirements. The common-law doctrine in regard to the requisites of a valid encumbrance of this kind, has not been essentially changed by legislation, while a change of possession was required at common-law; and is, in fact, yet required, in order to prevent subsequent creditors and purchasers from being imposed upon. The legislatures of the various States have, while reaffirming the principle settled by Twyne's Case, adopted a require-

ment which is construed to be equivalent to a change or delivery of possession, in enacting what is known as the registration laws. The object of the change of possession in olden times was for the sole purpose of affecting creditors and purchasers with notice of the encumbrances and rights of the mortgagee or possessor of the property. To obviate the change of possession, the registry laws were enacted; so that they are, in fact, mere statutes of notice. In all of the American States, where chattel mortgages are in use, statutes of this kind are in force, regulating, not only the question of notice, but the rights and remedies of parties, and declaring what are and are not valid mortgages. Such statutory enactments were designed for the express protection of those who were not parties to the instrument; as they designate against whom chattel mortgages shall be void, if not executed in conformity to the statutory provisions. While the statutes are uniform in requiring registration or change of possession, they are not in the designation of the persons affected; and while, in a majority of the States, a failure to deliver possession or record the mortgage is *prima facie* evidence of fraud as against all creditors and purchasers; others statutes make the exception that they must be creditors and purchasers without notice,—that is, without notice of the mortgage, whether recorded or not. The States making this exception are Alabama, Virginia, Iowa, and those States where the real estate and chattel mortgages are governed by the same law. The principles established by courts of equity and law in regard to the rights of purchasers without notice, are applicable in those States, while in the other States it is either absolutely void, or presumably so. In this regard mortgages of chattel and real estate cannot be assimilated; neither principle nor decision can control the plain language of a

statute. While a statute may seem harsh, and in many cases be the means of perpetrating seeming injustice, until repealed or amended, there is no court which is able to grant relief. Every State has the right to prescribe the requirements of a contract made within its limits, and the right to declare it void, if not made in conformity with the law. So that upon this question, the adjudications of each State, in construing the statute, must be given in lieu of general principles. Notice is either active or constructive. Actual notice is, where knowledge is brought home to the party to be affected by it; or a knowledge of circumstances which should lead him to a knowledge of such fact. But vague reports of strangers or disinterested parties, or mere general assertions that some other person claims title to the property, is not sufficient to affect a person with notice.[1]

Constructive notice is, in its nature, no more than evidence of notice. Whatever is notice enough to excite the attention of a man of ordinary prudence, and call for further inquiry, is, notice of all facts, to a knowledge of which an inquiry, suggested by such notice, and prosecuted with due and reasonable diligence, would have led; or, when certain acts have been done, of which the party interested is presumed to have knowledge, if on grounds of public policy, the presumption of which are so violent that the courts will not even allow of its being controverted; and where a party charged incautiously neglects to make inquiries, and designedly abstains from making such inquiries for the purpose of avoiding knowledge,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent or wilful determination not to learn it. If there is not actual notice that the property is in some

[1] Herman on Ex., § 329.

way affected, and no fraudulent turning away from a knowledge of facts which a *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply: the purchaser is a *bona fide* purchaser without notice.[1] The filing or recording of a chattel mortgage, is constructive notice to all the world of the debt, as well as the lien.[2] Subsequent creditors cannot complain of the transaction being fraudulent, unless they can show that the object and intention of the conveyance was to perpetrate a fraud, and avoid subsequent indebtedness.[3] When a mortgagee causes his mortgage to be recorded, he has done all that is required of him to preserve his lien; and all persons purchasing from the mortgagor subsequently, are bound at their peril to take notice of the mortgage, and of the prior rights of the mortgagee.[4]

§ 82. **Of the Validity of Mortgages as to Subsequent Purchasers and Creditors, dependent upon Notice.**—The recording acts in relation to mortgages relate to subsequent purchasers in good faith, and for a valuable consideration. The "persons" to whom the statutes concerning conveyances declaring, that a record thereof shall be notice, are the subsequent pur-

[1] Herman on Executions, § 360.

[2] Evans v. James, 1 Yeates, 172; Miller v. Whitson, 40 Mo. 97; Eddy v. Caldwell, 7 Minn. 225; Dick v. Balch, 8 Pet. 30; Parkhurst v. Alexander, 1 Johns. Ch. 394; Hughes v. Graves, 1 Litt. 317; Johnson v. Stagg, 2 Johns. 510; Dean v. De Lezardi, 24 Miss. 424; Bolles v. Chancey, 8 Conn. 389; Humphreys v. Newman, 51 Me. 40; Hickman v. Perrin, 6 Coldw. 135; Robinson v. Williams, 22 N. Y. 380; Rice v. Dewey, 54 Barb. 455; Partridge v. Swazey, 46 Me. 414; Root v. Schaffner, 39 Iowa, 375.

[3] Hickman v. Perrin, 6 Coldw. 135.

[4] Humphreys v. Newman, 51 Me. 540; Rice v Dewey, 54 Barb. 455.

chasers and mortgagees; and it is only in the case of subsequently acquired interests, and for the protection of the party claiming under the conveyance, that the record notice is efficacious. Prior purchasers or encumbrancers are not affected. The recording acts are prospective, not retrospective, in their operation.[1] Subsequent mortgagees or purchasers are so affected by the constructive notice arising from the registry of a prior mortgage, that they are subject to all the equities existing between the prior mortgagee and mortgagor.[2] In the States where a statute provides for a change of possession or registration, in order to give a chattel mortgage any validity against subsequent purchasers or creditors, no notice of a mortgage, however full or formal, will supply the place of registration.[3] This doctrine is the result of the express statutory provision, declaring all such instruments absolutely void.[4] A mortgage, registered as required by law, where the sum secured is unlimited, as where it is given to secure advances to be made at some future time, being valid between the parties, is valid as to all amounts advanced prior to the intervening of the rights of others; and is, therefore, notice as to all sums advanced on it, before a subsequent lien attaches.[5] Where it is defectively registered, as where there is a mistake as to the amount secured, where it is

[1] McCabe v. Gray, 20 Cal. 509; Truscott v. King, 6 Barb. 346; Dennis v. Burritt. 6 Cal. 670; Thomas v. Kelsey, 30 Barb. 268.

[2] Johnson v. Stagg, 2 Johns. 510.

[3] Robinson v. Willoughby, 70 N. C. 358; Bevans v. Bolton, 31 Mo. 437.

[4] *Vide* statutes of New York, Ohio, Kansas, and others similar.

[5] Robinson v. Williams, 22 N. Y. 380; Conrad v. Ins. Co., 1 Pet. 386; Shiras v. Craig, 7 Cranch, 34; Leeds v. Cameron, 3 Sum. 488; Hubbard v. Savage, 8 Conn. 215; Walker v. Snediker, 1 Hoff. Ch. 145; Com. Bank v. Cunningham, 24 Pick. 270; Monell v. Smith, 5 Cow. 441; Lyle v. Ducomb, 5 Binn. 585; Lansing v. Woodworth, 1 Sand. Ch. 43; Barry v. Merch. Exp. Co., 1 Sand. Ch. 314; U. S. v. Hooe, 3 Cranch, 73; Livingston v. McInlay, 16 Johns. 165; Turscott v. King, 6 N. Y. 147.

less than the actual sum, it is notice to the amount described in the registry.[1] Or, where it is dated a year prior to the date of the note, or there is a defect in the name of the parties, or the register fails to note the time of its receipt,—it is, nevertheless, constructive notice of the lien to purchasers.[2] There is a distinction in the statutory modes of registration. In some of the States, chattel mortgages are required to be copied at length upon the records of the register of deeds, in the same manner as a deed of real estate; in others, they are simply required to be filed, like a pleading in court, with the register of deeds, who notes the hour and day of filing, and makes a memorandum of the same in a book kept for that purpose; in which a brief description of the property mortgaged, the debt, names of parties, etc., — are given. As regards the filing, it is as effectual a notice as a record of the instrument would be. In using the term "registration" or "registry," both recording and filing will be included. Where a statute requires a record to be made, the whole instrument must be recorded,—that is, a mortgage and any schedule describing the property mortgaged, that may be annexed or attached to the mortgage, in order to give effectual notice to the public.[3] In some States, there is a certain time specified, within which chattel mortgages must be recorded or filed; as, within ten days after execution in Indiana. In New Jersey, if recorded within thirty days after its date, it will be duly recorded, and is then notice to all subsequent mortgagees and purchasers.[4] There is no general rule or requirement, which compels registration of a mortgage within

[1] Frost v. Beekman, 1 Johns. Ch. 288.

[2] Partridge v. Swazey, 46 Me. 414; Frome v. Jones, 13 Iowa, 474; Bank of Muskingum v. Carpenter, 7 Ohio, 21; McLaren v. Thompson, 40 Me. 561.

[3] Sawyer v. Purnell, 19 Me. 167.

[4] Plume v. Bone, 1 Green, 63.

any specified time. It takes effect, as to third parties, only from the time it is registered; and, so long as there are no creditors or purchasers to be affected by a non-compliance with the statute, there is no necessity for registration or notice. So that, outside of any statutory provision, it is optional with the mortgagee, whether his mortgage be registered or not; as he is the only one who will have to suffer for his neglect or omission, under statutes similar to the New York and Ohio statutes. The question of notice to subsequent creditors cuts no figure in the case. A mortgage which is unregistered, where the mortgagor retains possession, is fraudulent and void as to creditors of the mortgagor, although they have actual notice of the mortgage.[1] In other States the statutes, while they are copied from the New York and Ohio statutes, have the additional provision, that such mortgages shall be void as to creditors, etc., *without notice.* The words "without notice," in statutes providing that no sale of a mortgage of personal property, where the vendor or mortgagor retains actual possession, are valid against existing creditors or subsequent purchasers *without notice*, unless the instrument is recorded and executed in conformity with the *lex loci*,—applies to creditors, as well as purchasers; and the notice means either actual or constructive. Actual notice is when a person, other than the parties to the mortgage, either knows of the existence of an adverse claim or title, or is conscious of having the means of knowledge, and does not use them, whether his knowledge is from facts or circumstances.[2] So that, under this class of statutes, an unrecorded mortgage, whereof the mortgagor retains possession, is valid against existing creditors, who had no-

[1] Rich v. Roberts, 48 Me. 548; Travis v. Bishop, 13 Met. 304; Bevans v. Bolton, 31 Mo. 437; McCourt v. Meyers, 8 Wis. 236; Lockwood v. Slevin, 26 Ind. 124.

[2] Allen v. McCalla, 25 Iowa, 464.

tice of the mortgage at the time of its execution.[1] Notice of the existence of an unrecorded mortgage of personal property, seasonably received, may be sufficient to put a party upon inquiry, and charge him with knowledge if he neglect it; but such notice, merely received by a creditor after he has procured process, and is proceeding to enforce it, is insufficient.[2]

§ 83. Within the spirit and intention of the registration acts, a mortgagee of personal property is regarded as a purchaser; and the *bona fide* mortgagee or assignee of the mortgagee without notice of a prior claim, is entitled to the same protection as a *bona fide* grantee without notice.[3]

[1] Craigin v. Carmichael, 11 B. R. 511; Gavran v. Haupt, 9 Iowa, 83; Smith v. Nettles, 13 La. 241; Dearing v. Watkins, 16 Ala. 20; Bell v. Thomas, 2 Iowa, 384; Allen v. McCalla, 25 Iowa, 464; Boyd v. Beck. 29 Ala 703; Lewis v. Palmer, 28 N. Y. 271; Smith v. Zurcher, 9 Ala. 208; Hathorn v. Lewis, 22 Ill. 395.

[2] Stowe v. Meserve, 13 N. H. 46.

[3] Pierce v. Faunce, 47 Me. 507; Babcock v. Jordan, 24 Ind. 14; Manny v. Woods, 33 Iowa, 265.

# CHAPTER VIII.

## VALIDITY OF CHATTEL MORTGAGES UNDER STATUTES PROVIDING FOR REFILING OR RENEWAL.

OF THE DURATION OF THE MORTGAGE LIEN.—WHAT NECESSARY TO CONTINUE IT.—REFILING OR RENEWAL OF THE MORTGAGE.—REQUISITES NECESSARY FOR A RENEWAL. EFFECT OF FAILING TO COMPLY WITH THE STATUTE,—RIGHTS OF PARTIES, HOW AFFECTED,—WHEN TIME EXPIRES.

**§ 84. When Refiling unnecessary.—Effect of Omitting to Refile.**—A mortgage being a mere security, an instrument of preference, by which a debtor secures a creditor, or gives him a preferred or prior lien upon certain property or specific number of chattels, it becomes necessary to ascertain the extent and duration of such lien, and whether, upon its expiration, it can be continued or extended without the execution of a new mortgage. In regard to real estate mortgages, there are two classes of cases: one of which allows a mortgagee to obtain satisfaction out of the mortgaged property, and protect his lien upon the property, during the time an action would lie for the recovery of possession of real estate,—which period of time varies, in the different States, from ten to twenty years. The other class of cases adopt the equitable doctrine of security; establishing the principle that, as long as an action may be maintained for the debt, of which the note is merely evidence, and the mortgage the accident, the mortgagee's right to foreclose, and the lien of the mortgage exists. In the case of mortgages of personal property, the doctrine that a mortgage is merely

security, is uniformly established and settled by statute. In almost all the States, there are statutory provisions, governing and controlling the effect of chattel mortgages. In such statutes, there are provisions limiting the time during which such mortgages are to be and remain prior liens; and also provisions by which such liens may be extended or renewed. The requirements are, that the mortgagee, within thirty days prior to the expiration of the statutory period, makes and files an affidavit with the register or recorder of deeds, that the whole or a portion of the mortgage debt is still due from the mortgagor; and either refiles a copy of the mortgage, or it continues a lien by reason of the filing of the affidavit. It would seem that, under such statutory provisions, the lien of a chattel mortgage may be extended until the debt is paid or the mortgage satisfied. That such would be the result, there can be no doubt, were it not for the operation of the statute of limitations. A chattel mortgage may be renewed, year after year, by strictly complying with the statute; but, when once the statute of limitations bar an action for the debt, or an action for the recovery of the property, the statutory provisions will not destroy the effect of the limitation laws, while a debt may be due and unpaid, notwithstanding the bar of the statute of limitations; it requires some sort of acknowledgment on the part of the debtor to take it out of the operation of such statute; and, as the mere affidavit of a creditor will not, in that case, it cannot in the case of a chattel mortgage. So that, while the lien may be continued by a compliance with the statute, such compliance will not extend it beyond the time when an action can be maintained to recover the debt; or, as in Arkansas, as long as the statute permits an action to be brought for the recovery of personal property. The length of time a mortgage may retain

its priority against creditors, and be enforced against the mortgagor, is a matter of statutory regulation; but, where it is not so regulated, it is subject to judicial construction. In many States, the time is limited to one year, in which it is valid as against creditors and purchasers, without renewal. In Illinois, a mortgage, duly acknowledged and recorded, containing a provision that the mortgagor may retain possession of the mortgaged property, will, if the mortgage is executed in good faith, and to secure an honest debt, be valid against purchasers and creditors for the space of two years after the same is recorded, whether the debt for which it stands as a security then becomes due or not. At the expiration of that time, it ceases to be valid as against creditors, etc., of the mortgagor, unless the mortgagee takes possession of the property.[1]

§ 85. **Reason for Refiling.**—The object of the statutes, in making necessary the refiling of mortgages, and requiring that a copy shall be refiled within thirty days before the expiration of a year from the first filing, with a statement exhibiting the interest of the mortgagee, is to furnish a fair and reasonable notice to creditors and subsequent purchasers, and to prevent their being misled by the possession and apparent ownership of the mortgagor. To prevent fraud and deception against the same classes of persons, by means of leaving mortgages on file in the proper office, long after they have been partially or wholly satisfied by payment or other discharges, of which the public would have no means of knowledge, the statutes (they are all copied from the New York statute, with some slight change) provide that, after the expiration of one year from the FILING of the mortgage, it shall become

[1] Cook v. Thayer, 11 Ill. 617.

void as against creditors whose interests may be affected by it, and to all others who may subsequently acquire an interest in the property, as purchasers or mortgagees, unless there be again filed in the proper office within thirty days next preceding the expiration of said term of one year, a true copy of said mortgage, together with a statement of the mortgagee, exhibiting his interest in the property at the time, by virtue of such mortgage. While it seems possible to cite all the decisions relating to this question, under a statement of the provisions of any one of the statutes, as adjudications controlling the effect of such refiling, it will be discovered in this, as in almost all of the matters which are provided for by statute in the various States, that there have been, in some cases, slight changes and modifications; in others, material ones; and it is only upon a rigid comparison of the various statutes, that the discrepancies can be discovered. Again, courts, in construing the effect of a statutory provision, do not always give the exact language of the statute, but a general statement; so that it is not always safe to rely upon a decision as governing a statute, somewhat similar, although taken from the laws of the State where the adjudication was made. For instance, in New York, up to the time of the organization of the Commission of Appeals, there had been no adjudication upon the section regarding the refiling of mortgages by the Court of Appeals; and it was decided, in accordance with what seems to be the intent and spirit of the statute, that a refiling was necessary every successive year.[1] This construction was adopted by the Supreme Court of Ohio, upon a similar statute.[2] A case, arising under the New York statute, was decided by the Commission of Appeals, in which it was

[1] Nitchie v. Townsend, 2 Sandf. 299. [2] Seaman v. Eager, 16 Ohio S. 209.

held that, under a proper construction of the same statute, but one refiling was necessary to continue the lien of a mortgage, until barred by the statute of limitations.[1] In 1873, the statute was amended, so that it now conforms to the construction given it in Ohio, and a refiling is necessary every successive year. Again, while the statute in Kansas is taken from the Ohio statute, there is a marked change in its language; and, in place of refiling a copy of the mortgage and a statement by the mortgagee, the mortgagee is only required to make and file an affidavit of the amount due him, within thirty days prior to the expiration of the year; and the filing of such affidavit with the register of deeds, has the same effect, in continuing the lien of the mortgage, as the statute requirements have in Ohio and New York. The object in illustrating the distinction between the statutes of the three States, is for the purpose of showing that, an authority in a State where a law was originally enacted is not always to be cited as an authoritative construction of a statute having a similar effect, though copied from such original act,—the interpolation or omission of a word or sentence oftentimes creates such a change as to make the adjudication inapplicable.

§ 86. **Effect of Refiling a Copy.**—The effect of the statute, which declares a mortgage to be void after the expiration of a year, unless it is refiled, is that, if refiled, as required by such statute, it will, by the performance of such condition, become a valid security as against creditors and purchasers for another year. Every copy so filed, or affidavit made, is to be regarded as a new mortgage for the purpose of notice to all parties.[2]

[1] Newell v. Warren, 44 N. Y. 244. Nitchie v. Townsend, 2 Sandf. 299;
[2] Swift v. Hart, 12 Barb. 530; Seaman v. Eager, 16 Ohio S. 213.

**§ 87. How the Time is to be Ascertained.**—In ascertaining the time when such mortgage becomes void, fractions of the day are not to be disregarded. The statutes in regard to the renewal of mortgages require that fractions of a day shall not be disregarded, in computations of time running from the act of filing. The statutory provisions relating to this class of instruments requires the register to indorse, upon the instrument deposited with him the time of receiving it. The moment it is filed in the proper office, it becomes effective, and will have priority over a competing instrument, filed one minute afterwards. The law takes notice of the exact time at which each is filed, and, therefore, requires that time to be indorsed by the recorder. And the time within which it must be renewed, is "one year from the filing thereof,"—not from the close of the day of filing, but from the time when the act of filing occurs. So that the year begins to run, not from the close of the day of filing, but from the exact time on such day when filed.[1] Where the year expires on Sunday, that day is included.[2] It must be done during the thirty days immediately preceding the expiration of the year. A refiling, before the commencement of the thirty days, is unavailable.[3]

**§ 88. What is a Sufficient Compliance.**—If the statement or affidavit is made in good faith, with reasonable care, and is substantially correct and accurate, the mortgagee will be held to have complied with the intent and spirit of the statute.[4] The statement exhibiting the interest of the mortgagee in the property required on renewal of a mortgage, must be positive and distinct as

[1] Seaman v. Eager, 16 Ohio S. 209.
[2] Paine v. Mason, 7 Ohio S. 198; Nitchie v. Townsend, 2 Sandf. 299.
[3] National Bank v. Sprague, 20 N. J. Eq. 13.
[4] Patterson v. Gillies, 64 Barb. 563.

to that interest. It should give such precise information of the amount due, as to enable other creditors or persons to judge how far it would be safe or prudent to give credit to the mortgagor.[1] Refiling the original mortgage with the statement required by the statute, that a true copy be again filed, is a sufficient compliance.[2] So a statement is sufficient which annexes and refers to another document filed with it, if the two papers, read together in connexion with the original mortgage, disclose the interest of the mortgage intelligibly.[3] Such statement must be made by the mortgagee; a statement made by the mortgagor, without the authority of the mortgagee, is insufficient.[4] Such a statute does not forbid the filing of a new mortgage upon the same property, in lieu of a refiling a copy.[5]

§ 89. **Refiling when Unnecessary.**—When, after default by the mortgagor, an actual change of possession has taken place, or the rights of parties have been changed by some new act or contract in relation to the property, which would render a refiling an idle ceremony, omission to refile will not impair the right of the mortgagee.[6] Where the mortgagee advertises the property for sale, under a power of sale contained in the mortgage, previous to the expiration of one year from the time of filing the mortgage, he is excused from the obligation of filing a copy within thirty days previous to the expiration of the year. This statutory provision is applicable only to cases where the mortgagee allows the mortgagor to

[1] Theriot v. Prince, 1 Edm. Sel. Cas. 219.

[2] Stockham v. Allard, 4 T. & C. 279; Paine v. Mason, 7 Ohio S. 198.

[3] Beers v. Waterbury, 8 Bosw. 396.

[4] Newell v. Warren, 44 Barb. 258.

[5] Lee v. Huntoon, 1 Hoff. Ch. 447.

[6] Porter v. Partonly, 34 N. Y. Sup. Ct. R. 398.

continue in possession of the mortgaged property after the expiration of the year, without taking the property into his actual possession, or adopting some proceedings to enforce the forfeiture of the mortgage, or to sell the equity of redemption of the mortgagor previous to the expiration of the year from the filing of the mortgage. Nor is it necessary to comply with the statute for refiling, to continue a mortgagee's right of action against a creditor who, before the thirtieth day preceding the expiration of the year, and while the mortgage was still in force, seizes the property in such a manner as to make him a trespasser, the rights of the parties are fixed by the taking, and are to be determined as they were at the beginning of the suit.[1]

§ 90. **What is not a Sufficient Compliance with the Statute to Extend the Mortgage Lien.**—In order that a mortgage shall continue valid as against creditors and purchasers, it must be renewed by refiling. Where there has been no forfeiture on the part of the mortgagor, by non-payment of the mortgage debt within the period limited by the condition of the mortgage, the statutes requiring a refiling before the expiration of a year from the filing of the original mortgage are imperative and unrelaxing, and a non-compliance will not be excused so as to obviate the statutory effect thereof, by proving that the failure was a mere clerical error. But this error must be in some material particular, and such as to affect the nature or effect of the instrument, or the rights of parties under it, as where the copy for refiling was for $600 and the original mortgage was for $500, the intended copy is of no effect and invalid as against creditors.[2]

[1] Case v. Jewett, 13 Wis. 498; Otis v. Sill, 8 Barb. 102. Newman v. Tymeson, 12 Wis. 448;

[2] Ely v. Carnley, 19 N. Y. 496

Where a mortgagee, within the expiration of the thirty days, causes a copy to be refiled, and an understatement of the amount due, while it does not affect the validity of the mortgage as to the amount which is stated, he cannot, as against the parties designed to be protected by the statute, afterwards claim that any greater sum is secured by the mortgage than is mentioned in terms, or by intelligible reference in his statement. Thus, on refiling a mortgage, which, by its terms, was given to secure the payment of certain notes, and also to secure the mortgagee against outstanding liabilities, the statement filed on renewing the mortgage was, that the amount of the unpaid notes constituted the mortgagee's interest, and made no reference to any claim that the mortgage was held as security against the outstanding liabilities. Such outstanding liabilities then, in fact, existed, and a copy of the agreement between the parties, which was annexed and filed with the statement, and referred to in it, stated that the mortgage was given to secure such outstanding liabilities. Held, that as against subsequent purchasers, the renewal was good as to the amount claimed as due upon the notes, but it was not good as to any outstanding liabilities.[1] So where a mortgagee, within the thirty days prior to the expiration of the year from filing the mortgage, procured an indorsement of the words, "refiled and renewed," with the date to be made thereon, which was signed by the Recorder: it was held that this was not a sufficient statement of the "interest" of the mortgagee in the property within the statute, and that the mortgage at the expiration of the year became invalid, as against creditors of the mortgagor.[2] So a refiling in the town where the mortgagor resided at the time of the execution

[1] Beers v. Waterbury, 8 Bosw. 96. [2] Fitch v. Humphreys, 1 Denio, 168.

of the mortgage, after he has become a non-resident, is insufficient;[1] and a purchaser in good faith, after the expiration of the year, gains a title superior to the mortgagee. Not only purchasers from the mortgagor, but from his vendee, his executor, but, in certain cases, from his widow, are entitled to the protection given by statutes in relation to the filing and refiling of mortgages, and where a mortgagor of property is permitted to remain in possession of property more than a year without refiling the mortgage, a party who purchases in good faith, or a subsequent mortgagee, acquires a good title as against such prior mortgagee.[2]

**§ 91. Of the Effect of Omitting to Comply with the Statute as regards Subsequent Mortgagees and Others.**—The omission to refile a mortgage does not affect its validity, as against a subsequent mortgagee, with notice,[3] or as against purchasers or mortgagees *intermediate*, the original filing, and the time prescribed for refiling. Unless the copy and the statement required by statute be filed within the thirty days next preceding the expiration of one year from the time when it was originally filed, the mortgage will be void, as against a levy made within the year by an execution creditor of the mortgagor. Though a mortgagee cannot avail himself of the omission to refile, unless he became such during the continuance of the default, it is otherwise of a general creditor, who may take advantage of such omission,

[1] Dillingham v. Bolt, 37 N. Y. 198.

[2] Fox v. Burns, 12 Barb. 677; Jones v. Howell, 3 Rob., N. Y. 438; Meech v. Patchin, 14 N. Y. 71.

[3] Hill v. Beebe, 13 N. Y. 556; Wetherell v. Spencer, 3 Mich. 123; Sanger v. Eastwood, 19 Wend. 515: Gregory v. Thomas, 20 Wend. 17; Meech v. Patchin, 14 N. Y. 71; Thompson v. Vanvechten, 6 Bosw 673.

though his right accrued previous to the default.[1] The omission to refile will not invalidate the mortgage, excepting in favor of creditors who were such either when the mortgage was made, or while the mortgagor was in the possession and control of the property. But where a person purchases, or a subsequent mortgagee obtains his security during the year; the statute will not be construed as applicable to him.[2] As to purchasers and subsequent mortgagees without notice, the instrument loses its validity.[3] Under such statutes, if the mortgaged property is taken and sold under legal process, before the expiration of the year from the filing of the mortgage, the mortgage being valid in its inception, and the mortgagee, at the date of the levy, having the right to the possession, the sale is a conversion of the mortgagee's property, and gives him a complete cause of action, even though he does not commence such action until after the expiration of one year from the filing of the mortgage; and although no copy of the mortgage be filed within thirty days before the expiration of the year, as required.[4]

[1] Thompson v. Vanvechten, 27 N. Y. 568.

[2] Latimer v. Wheeler, 30 Barb. 480; Dillingham v. Ladue, 35 Barb. 38.

[3] Day v. Munson, 14 Ohio S. 488; Manning v. Monnahan, 1 Bosw. 489.

[4] Edson v. Newell, 14 Minn. 228; Case v. Jewett, 13 Wis. 498; Newman v. Tymeson, 12 Wis. 448.

# CHAPTER IX.

## OF THE POSSESSION OF MORTGAGED CHATTELS.

WHAT IS A SUFFICIENT CHANGE OF POSSESSION.—WHAT NOT, WHEN A MORTGAGOR ENTITLED TO POSSESSION.—VALIDITY AS AFFECTED BY POSSESSION.—OF THE MORTGAGEE'S RIGHT TO POSSESSION.—WHAT IS SUFFICIENT TO AUTHORIZE HIS TAKING POSSESSION.—WHEN A MORTGAGEE MUST TAKE POSSESSION.—WHEN HE WILL BE PRESUMED TO HAVE WAIVED HIS RIGHT TO POSSESSION.—STIPULATIONS IN THE MORTGAGE GIVING THE MORTGAGEE THE RIGHT OF POSSESSION.—VALIDITY OF MORTGAGES WHEN POSSESSION IS NOT CHANGED.—IS A MORTGAGEE ENTITLED TO POSSESSION IN THE ABSENCE OF ANY STIPULATION OR STATUTE?

§ **92.** In the preceding chapters we have examined and endeavored to trace the doctrine in regard to the necessity for the change of possession, and the effect of the Registration Laws so far as the same dispenses with an actual change of possession, and is regarded as a sufficient change to be notice to the whole world of the mortgagee's lien upon the property. The registration of a chattel mortgage being a substitute for delivery of possession of the property mortgaged,[1] the compliance with the registra-

[1] Robinson v. Elliott, 22 Wall. 513; Barker v. Hall, 13 N. H. 298; Call v. Gray, 37 N. H. 432; Bunce v. Smith, 3 H. & J. 499; Hambelon v. Hayward, 4 G. & J. 433; Bogard v. Gardley, 11 Miss. 302; Harrington v. Brittain, 23 Wis. 541; Tyler v. Strang, 21 Barb. 98; Foster v. Beall, 1 H. & J. 31; Smith v. McLean, 24 Ia. 322; Hughes v. Cory, 20 Ia. 399; Kuhn v. Graves, 9 Ia. 303; Feurt v. Rowell, 62 Mo. 524; Miller v. Bascom, 28 Mo. 353; Miller v. Whitson, 40 Mo. 97; Bank v. Hunt, 11 Wall. 391; Donaldson v. Johnson, 2 Chand., Wis. 162. Ante, chap. vii.

tion laws of the State where the mortgage is executed does not legalize an illegal mortgage nor validate one, which was fraudulent in its inception. The registration laws do not repeal the statutes concerning fraudulent conveyances, but add another to the grounds upon which a mortgage of personal chattels shall be void, so that the question of good faith and the intention of the parties to the transaction is not affected by the Registry Laws. They simply are the means of notifying those having transactions with the mortgagor, that there is an incumbrance or a pretended mortgage upon his property, and the person dealing with him can ascertain all about the transaction by enquiring of the mortgagee, who, if it be an honest mortgage, will give him full particulars, and thus prevent any one from claiming that they were misled and deceived by the mortgagor being in possession of the property and treating it as his own. It is a matter to be arranged by the parties to the transaction, as to which one of the provisions of the law they will comply with, registry, or actually placing the mortgagee in possession of the property.

§ 93. **Possession Necessary when no Record is made of the Mortgage.**—Actual change of possession being one of the prerequisites to the validity of a chattel mortgage, we will now examine the degree of possession which is deemed sufficient. Personal chattels are deemed to be in the apparent possession of the mortgagor so long as they shall remain, or be, in or upon any premises occupied by him, or as they shall be used or enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken or given to another person. Apparent possession raises no presumption of fraud if the instrument be registered, but if it be not

registered, the apparent possession will not merely raise a presumption of fraud, but will invalidate the transaction as against all creditors and purchasers. Mere possession of personal property which is not used for purposes of trade, though indicative of title, is not title, and the person to whom possession is transferred must take the hazard of the demand by the proper owner.[1] So that possession in all cases is not evidence of ownership, but it gives the possessor the opportunity of using the property and appearing to the world as its owner, which is the mischief the statute of fraudulent conveyances and the registry laws were designed to prevent. Possession of personal property by a mortgagor after the execution and delivery of a mortgage, has, since the decision in Twynes' case, been regarded as inconsistent with the *bona fides* of the transaction. Chattel mortgages are now held valid, without any actual possession by the mortgagee, by reason of the positive provisions of State laws, or by a stipulation in the contract allowing the mortgagor to retain possession until default of payment, or some breach of the conditions of such mortgage. Under such circumstances, such possession is deemed compatible with the *bona fides* of the transaction, and does not mislead creditors and purchasers.[2]

[1] Agnew v. Johnson, 22 Pa. 471; Moulton v. Lawrence, 50 Me. 100; St. Augustine v. County, Bright, Pa. 116.

[2] Ravisies v. Alston, 5 Ala. 267; Destra v. Scales, 6 Ala. 356; Martindale v. Booth, 3 B. & A. 505; McLachlan v. Wright, 3 Wend. 348; Beekman v. Bond. 19 Wend. 444; Warren v. Magdalen Co., 1 Rol. 169; McComber v. Parker, 14 Pick. 497; Langdon v. Buel, 9 Wend. 80; Jones v. Smith, 2 Ves. 378; Gardner v. Adams, 12 Wend. 297; Barrow v. Paxton, 5 Johns. 258; Bullock v. Williams, 16 Pick. 33; Look v. Comstock, 15 Wend. 244; Lewis v. Stevenson, 2 Hall, 63; Forbes v. Parker, 16 Pick. 462; Randall v. Cook, 17 Wend. 53; Badlam v. Tucker, 1 Pick. 389; Roberts v. Roberts, 2 B. & A. 369; Magee v. Carpenter, 4 Ala. 469;] Jones v. Yates, 9 B. & C 532.

§ 93*a*. **What is a Sufficient Delivery or Change of Possession.**—There are a great number of cases upon which delivery of possession has been made the test of the validity of chattel mortgages, both prior to and since the adoption of the registry laws. In the absence of any statutory provision like that providing that all mortgages which are not followed by an actual and continued change of possession, shall be absolutely void against creditors and purchasers, *unless the mortgage, or true copy thereof, is recorded, filed, registered*, etc. Delivery, actual or symbolical, is necessary to the validity of a chattel mortgage.[1] So that it may be said that the general rule is, where a mortgage is not recorded, in order to make it a valid instrument, as against creditors and others, there must be an actual delivery of the property to, and retention of the same by, the mortgagee.[2] In Vermont, neither a mortgage, nor pledge of, nor lien upon, personal property, can be available against subsequent attachments, without a change of possession.[3] There is no statute in that State authorizing chattel mortgages upon all kinds of property. The statute provides for mortgages of machinery, rolling stock, etc., and provides that valid mortgages of rolling stock, cars, engines, fixtures and furniture, may be made without delivery or change of possession. In Delaware and Pennsylvania and Louisiana chattel mortgages are not provided for by statute; and all conveyances of personal property by way of mortgage must be followed by change of possession. In California, under the statute of 1850, no chat-

[1] Goodenow v. Dunn, 22 Maine, 86.

[2] Wright v. Fetlow, 99 Mass. 397; Tyler v. Strang, 21 Barb. 198; Curtis v. Leavitt, 17 Barb. 309; Adams v. Wheeler, 10 Pick. 99; Parshall v. Eggart, 52 Barb. 367.

[3] Russell v. Fillmore, 15 Vt. 130; Sturgis v. Warren, 11 Vt. 471; Woodward v. Gates, 9 Vt. 358

tel mortgage was valid as against creditors and purchasers, without delivery of possession.[1] In New Hampshire, where the mortgagor resides out of the State, there can be no record; under the statute, the mortgagee must in such case take and retain possession of the property, in order to hold it against other creditors of the mortgagor; unless, perhaps, in the case of actual notice.[2] This rule would not apply in those States where provision is made for a record of the mortgage in the county or township where the property is located. Where a mortgage is made, and is followed by a change of possession, it is good, though not in writing.[3] And where it is so defective as to amount to an executory contract merely, it is good as against creditors, if the mortgagee is in possession before their claims are merged into judgments.[4] The doctrine that retention of possession is conclusive of fraud, is one of policy.[5] Although a mortgage may be made for a valuable consideration, and the real intent of the parties may be to encumber the property in such a manner as to give to the mortgagee a prior lien as against all creditors, yet where the possession continues in the mortgagor, and the mortgage is unrecorded, such possession is regarded as a means of giving him a collusive credit, and operating as a fraud upon creditors. Such conveyances are declared to be absolutely void by statute and by courts, as to creditors, though there be no fraud, in fact, in the transaction.[6] What the actual in-

[1] Meyer v. Gorham, 5 Cal. 322; Hacket v. Manlove, 14 Cal. 85.

[2] Smith v. Moore, 11 N. H. 55.

[3] McTaggart v. Rose, 14 Ind. 230.

[4] Coe v. Columbus, &c, R. R. Co., 10 Ohio, S. 872; Oliver v. Town, 28 Wis. 328; Cherpron v. Teikart, 68 Ill. 284.

[5] Kirtland v. Snow, 20 Conn. 23; Mills v. Camp, 14 Conn. 219; Wilson v. Hooper, 12 Vt. 653.

[6] *Vide* statutes of the various States. Milne v. Henry, 40 Penn. 352, Weeks v. Weed, 2 Aik. 64; Twyne's Case, 3 Co. 80; Edwards v. Harben 2 T. R. 587.

tentions of the parties were, makes no difference. It is not a question of intent; and no evidence is admissible to show that the transaction was in good faith. The rule in Twyne's Case, which, prior to the enactment of the registration laws, gave rise to such a vast amount of discussion by the courts, who created some twenty-five exceptions to that rule, has been enacted in almost every State in the Union; and all mortgages not recorded as provided by statute, or in which there is no actual change of possession, or where it is retained by the mortgagor, are declared absolutely void as to creditors and purchasers.

Assuming that a mortgage is not registered, we will now ascertain what delivery of possession will satisfy the requirements of law. The delivery must be actual, and such as the nature of the property will admit.[1] A mere symbolical or constructive delivery, where an actual delivery is practicable, is of no avail. Symbolical delivery is necessary only where peculiar circumstances preclude the possibility of actual possession, and there it is equivalent to actual possession, because the transaction is susceptible of no act of greater notoriety. Time may be necessary to remove ponderous articles, growing crops and the like. But where the property is of such a nature that there may be an immediate change of possession, that change must be made, or the law will pronounce the transaction fraudulent as against creditors and subsequent purchasers. It is idle to say that the mortgagor needed the use of the property, and was therefore left in enjoyment of it. That is but the common case where men wish to place their property beyond the reach of their creditors.

[1] Fry v. Miller, 45 Penn. 441; Morse v. Powers, 17 N. H. 286.

When the possession is not changed, the burden of proving fraud does not lie on the creditor or purchaser, nor are courts or juries to speculate upon the probabilities of good faith in a given case; the transaction is fraudulent in law, and neither courts nor juries can disobey the law. Like other general rules, it may sometimes operate with severity, but the hardship or inconvenience in a particular case is not to be compared with the advantages which must result from having one uniform rule of decision, and that rule of such a character as will effectually protect the community against frauds of this description. Actual possession is used in contradistinction to constructive possession. Actual possession excludes the idea of a mere formal change of possession. It will not be a sufficient delivery of possession if the mortgagor gives the mortgagee possession, and then takes the property back into his own possession and keeps and uses it as he did before the execution of the instrument. This is not the possession which the law requires or the statutes demand. There must not only (in many States, see statutes) be a delivery of possession, but it must be immediate and continuing. The statute of fraudulent conveyances is designed to prevent a transfer or incumbrance of property by which the debtor has the beneficial use of the property, and so incumbers it as to prevent its being subjected to the satisfaction of his debts. So that a mortgagee, in order to obtain a valid, prior and paramount lien upon the property of his debtor, must take actual possession as soon as the mortgage is made, which possession must be open and unequivocal, carrying with it the usual indications of ownership by the mortgagee. It must be accompanied with such unmis-

takable acts of control and ownership as a prudent man would exercise. So that all persons may have notice that he owns and has possession of the property, and such as to give evidence to the world of the claims he has as such new owner, so that the mortgagor cannot deceive or defraud any one by keeping up the appearance of an unqualified ownership of property which is subject to the lien and satisfaction of a particular debt or claim. The rule does not determine what acts shall constitute a delivery and continued change of possession.[1] Change of possession is mainly a fact like possession or seizin, but, of course, these facts being conceded or found, all these matters then resolve themselves into a mere judgment of law.[2]

The question of change of possession is purely one of law, and, as such, is to be decided by the court. The court must judge of those acts which are sufficient evidence of delivery.[3] Possession being a fraud in law,[4] without regard to the intent of the parties, becomes a question for the court, and not for the jury, to decide. When there is no proof to show that possession *accompanied* and followed *the transfer*, the court[5] instructs the jury that the transaction is fraudulent. In Connecticut the question is one of fact to be found by the jury.[6] When there is any evidence tending to prove a change of possession, the question must be submitted to the jury.[7] The evidence must be such as would justify the jury in inferring, under the instructions of

[1] Godchaux v. Mulford, 26 Cal. 314.

[2] Burrows v. Stebbins, 26 Vt. 659.

[3] Young v. McClure, 2 W. & S. 147; Carpenter v. Mayer, 5 Watts, 243; Milne v. Henry, 40 Penn. 302.

[4] Cadbury v. Nolen, 5 Penn 320; Burrows v. Stebbins, 26 Vt. 659.

[5] Young v. McClure, 2 W & S. 147; Dewart v. Clement, 48 Penn. 413.

[6] Swift v. Thompson, 9 Conn. 63; Howe v. Keller, 27 Conn. 538.

[7] Warner v. Carlton, 22 Ill. 415; Stephenson v. Clark, 20 Vt. 624.

the court, that there has been an actual and exclusive change of possession.[1]

When there is a conflict of testimony in regard to the change of possession, the question must necessarily be referred to a jury. Should a court, in such a case, attempt to assert authoritatively the presence of legal fraud, it would be usurping the rights of a jury.[2] The question is to be submitted to a jury to find the facts, and the court is to say what facts, if found by the jury, will constitute a sufficient change of possession.[3] The rule is no reason for excluding the evidence of the transfer. It is the judgment of the law from the evidence, and not a ground to exclude evidence.[4] A possession of a mortgagee (who is joint tenant of goods mortgaged with the mortgagor) *per my et per tout* is not such a possession as will remove the presumption of fraud, if the mortgagor continue to exercise acts of ownership upon the things mortgaged. Therefore, if there be two partners in trade, and one of them take a mortgage of the utensils, stock in trade, debts, profits, etc., for securing a sum of money lent by him to the other, and, notwithstanding, suffers him to continue in possession of the partnership stock in trade and utensils, and to alter and dispose of the goods, and receive the debts as before, such mortgage will be fraudulent as respects third persons; for, although the mortgagee's being seized *per my et per tout* will remove the necessity of an actual delivery, yet the mortgagor's

1 McKibbin v. Martin, 64 Penn. 302.

2 Forsyth v. Mathews, 14 Pa. 100; Wilson v. Hooper, 12 Vt. 653; Hodgkins v. Hook, 23 Cal. 581

3 Burrows v. Stebbins, 26 Vt. 659; Stephenson v. Clark, 20 Vt. 624.

4 Sherron v. Humphreys, 2 Green, 217.

being permitted to act, after parting with all the interest, until redemption, renders the contract fraudulent, as otherwise a door would be open to fraud by a partner being permitted to retain all the badges of ownership to deceive the rest of the world;[1] and the conclusion of law would be the same if the mortgage were made to a third person; for, in such a case, the mortgagee ought to be admitted partner for the moiety.

§ 94. **Exceptions to the Rule above Stated.**— The delivery of a key of a warehouse is a delivery of the goods therein contained, if, from their bulk, they admit of no other delivery. And, generally, if, in the nature of the transaction, no delivery can be made of the goods, although the same are present, possession retained seems to be no badge of fraud. But if, on a mortgage of goods, the mortgagor agreed to deliver them and afterwards did not deliver them at the time appointed, but, in an action against him, keeps the mortgagee at arms' length, this would not be considered as leaving the goods by the mortgagee in the possession of the mortgagor, the mortgagee having done everything in his power to get the possession from him.[2] So, if a mortgage were made of goods which were agreed to be delivered into the parties' own hands, or the key of the warehouse agreed to be given up (which, in bulky goods, is all that can be done), but no such delivery was made, and detinue was brought for them, they would not be considered as left in the possession of the mortgagor, the pursuit in a court of justice excluding any actual or presumed consent. Hence, therefore, possession alone is not sufficient

[1] West v. Skipp, 1 Ves. 240.

[2] Ryall v. Rowles, 1 Ves. 348; Porter v. Parmley, 52 N. Y. 185; Bullis v. Montgomery, 50 N. Y. 352.

ground of fraud to subject the property of one person to the debts of another. There must be proof of the consent of the mortgagee to leave the goods in the power and disposition of the mortgagor, or laches in letting them remain there for the purpose of giving the ostensible possessor a false and delusive credit with the world.

§ 94*a*. An actual, immediate change of possession being one of the essential requirements of a valid mortgage, mere words of delivery, as, I deliver the property to you, or pointing it out to the mortgagee, is insufficient,[1] as where a mortgagor points out a part of a drove of cattle. But where a mortgagee takes such possession of the thing mortgaged as its nature and circumstances will admit of, it will be valid. Thus, where the lessee of a farm at a money rent, after he had removed from it, mortgaged to a creditor a growing crop of barley, sown the previous fall, for whom the incoming tenant took and maintained possession until the crop was harvested by the mortgagor according to agreement, and placed it in the barn upon the premises in the exclusive custody of the agent of the mortgagee, it was held that the mortgage was valid, that the mortgagee had a right of property in the grain as against an execution creditor of the mortgagor, who had no right to take the grain except on payment of the mortgage.[2] So, where there is an agreement that the mortgagee shall take the property in satisfaction of the debt, and that he may immediately take possession, that is equivalent to actual delivery, if the property is at a

[1] Doak v. Brubaker, 1 Nev. 218; Menzies v. Dodd, 19 Wis. 343; Smith v. Moore, 11 N. H. 55; Porter v. Parmley, 52 N. Y. 185; Bullis v. Montgomery, 50 N. Y. 252; Doyle v. Stephens, 4 Mich. 87.

[2] Fry v. Miller, 45 Pa. 441.

great distance, and the mortgagee uses no laches in obtaining possession.[1] Evidence that in order to avoid recording a mortgage the mortgagor put the property in a certain room which he then occupied, but from which he soon removed and delivered up the key to a third person to keep for the mortgagee until he should pay the debt secured; or, where a keeper is placed over the property, and, during his absence, it is taken by the mortgagor's assignee, is a sufficient delivery as against creditors of the mortgagor.[2] So, where mortgaged goods have been attached and the bailee of the attaching officer, while the custody of the goods is in him, consents to hold the goods as the servant of the mortgagee, and actually holds for him, it is such a taking of, delivery and retaining of, possession by the mortgagee as to make a record of the mortgage unnecessary.[3] So, where a mortgagee of four hundred tons of coal, part of a larger pile on a wharf belonging to the mortgagor, took possession of the whole pile with the mortgagor's consent, and appointed the mortgagor his agent to sell the coal for him, it was held that there had been a sufficient delivery to vest the title in the mortgagee, and that he was entitled to hold it until he had sufficient time and opportunity to separate and remove his four hundred tons.[4] So, a mortgagee is to be deemed in actual possession after he has taken possession and left the property in the hands of a stranger as his agent, though it has not been removed from a building which was included in the same mortgage.[5] So, where A. mortgaged goods in his store to B., and no an-

[1] Patrick v. Meserve, 18 N. H. 300.

[2] McPartland v. Read, 11 Allen, 231; Carpenter v. Snelling, 97 Mass. 452; Morse v. Powers, 17 N. H. 286; Laflin v. Griffiths, 35 Barb. 58; Smith v. Putney, 18 Me. 87.

[3] Wheeler v. Nichols, 32 Me. 233.

[4] Weld v. Cutler, 2 Gray, 195.

[5] Laflin v. Griffith, 35 Barb. 58.

nouncement of the fact was made; the goods were not moved; the same clerk continued to have charge of the store and goods, and made use of the same books of account, though acting in fact as the agent of B., there was not such a change of possession as rendered the mortgage valid against a mortgagee of later date but prior registry.[1]

In Connecticut, where there is a mortgage of household furniture, a change of possession is not essential, and a mortgage of all the furniture in a hotel, where all the rooms in the hotel. as well as the furniture in them, is used indiscriminately by the family of the mortgagor for family purposes, as they had occasion, as well as for the accommodation of guests, is a mortgage of furniture used in a dwelling-house for house-keeping purposes, and a change of possession is not necessary.[2] In a mortgage where the things mortgaged are in the actual possession of a third person, immediate delivery of the property is not necessary. In a case of this kind, there is nothing that conflicts with the statutory requirements. If the mortgagor is not in the control and possession of the property, then the statutory provision cannot apply. The statutes do not require that the mortgagee shall take actual possession of the property at the time himself. It is enough if he removes it out of that of the mortgagor. And if, at the time the mortgage is made, he finds the property in the possession of a third party, there is nothing to prevent leaving it there until he chooses to take possession.[3] A mortgage of property not in possession of the mortgagor is void for want of delivery, when the mortgagee has demanded it, although he has not obtained possession.[4] If a mortgagee take

1 Doyle v. Stevens, 4 Mich. 87.
2 Croswell v. Allis, 25 Conn. 311.
3 Nash v. Ely, 19 Wend. 523.
4 Goodwin v. Kelley, 42 Barb. 194.

possession of the property under his mortgage, he cannot hold the property as a pledgee, if his mortgage is declared void. It gives him no greater rights as against creditors than if he came into possession by a trespass.[1] Nor can the rule be applicable in cases where exempt property is made the subject of a mortgage, as the property could not be reached by the general creditors, if not mortgaged; as to them a mortgage of that character of property cannot make it subject to execution, where it is exempt by statute.[2]

§ 95. **Of the Mortgagee's Right to Possession. What is sufficient Breach of Condition to give him the Right. Stipulations for the Mortgagor's Retaining Possession.**—Having ascertained the reasons for the origin of the rule established in Twyne's case, and in the cases following, and affirming the principles there established, it will be seen that, prior to any statutory regulation of chattel mortgages, an actual change of possession was one of the ingredients of good faith in establishing the validity of a transaction of this kind. This being the common-law doctrine, and the mode in which pledges were made, some courts, regarding a mortgage as a mere pledge, did not make the distinction made by the civil law between pledges and hypothecations, and have always determined, in accordance with the common-law principles, that a mortgagee, in the absence of any stipulation in the instrument, is entitled to the possession of the property (*ante*, chap. I). The confusion created by the great contrariety of decisions upon this question has been a matter of constant annoyance to the bench and the bar, but has been, to a great extent, harmonized by

[1] Deleware v. Ensign, 21 Barb. 85; Jauvrin v. Fogg, 49 N. H. 340.

[2] Anthony v. McWade, 1 Bush. 110; Morton v. Ragan, 5 Bush. 334; Foster v. McGregor, 11 Vt. 595; Patten v. Smith, 5 Conn. 196.

legislative enactment. To obviate the law as settled by the courts, it became necessary to insert stipulations in the mortgage whereby the mortgagor might retain possession of the property incumbered, until a certain event therein specified should occur, either a default in the payment of the mortgage debt, interest, or the removal or attempted disposal of the mortgaged property by the mortgagor. Such provisions, for the retention of the mortgaged property by the mortgagor, being consistent with the nature of the transaction, were declared so by many courts; and when the statutes provided for registry, registration became acknowledged by courts as equivalent to an actual and continued change of possession, prior to a breach of the condition. The common-law rule became obsolete, and therefore of little practical value as a principle of law. The distinction between absolute sales and mortgages of personal property is such that the principles of law governing the former cannot be cited as applicable to and governing the latter; nor can that governing pledges be of universal application. Mortgages, being mere securities,—conveyances of property differing from any other species of conveyance,—are controlled by statute and principles of equity. So that what would be deemed fraud in the case of an absolute sale, cannot be deemed fraud in the case of a mortgage. In the case of mortgages, the possession of the mortgagor is not inconsistent with the terms of the contract and the nature of the transaction; for, before condition broken, it is uncertain whether or not the property will vest absolutely in the mortgagee; and nothing is more common than to permit the mortgagor to retain possession. Stipulations to this effect are constantly inserted in mortgages, where, by the terms of the mortgage, the mortgagee is not to have

possession until the performance or non-performance of a certain condition. The mortgagor's continuing in possession is no evidence of fraud, because it is consistent with the trust appearing on the face of the deed, and is not presumed to give a false credit to the mortgagor.[1] And it is for this reason that the retention of possession by the mortgagor is not deemed fraudulent, where a mortgage stipulates that the mortgagor is to remain in possession until default in payment, or for any other breach of condition. Such stipulations are consistent with the nature of the transaction, and until such default or breach of condition, the mortgagee cannot take possession. This, however, is subject to this qualification: that the mortgage be filed or recorded as required by law. Such being the general rule, we will now ascertain what is such a breach of condition as will authorize a mortgagee to take possession.

§ 96. **Right of the Mortgagee to Possession after Default.**—A mortgage being made as security for debt, and being a conveyance which vests the title in the mortgagee, after condition broken, for the purpose of subjecting the property to the satisfaction of such debt, the mortgagee is considered the true owner for that purpose, and has a right to the actual possession and control of the property in the event of the non-payment of the debt due him from the mortgagor. An agreement between the parties, in reference to the temporary possession of the goods, does not alter the rights of the mortgagee;[2] and for this purpose he may enter

[1] Letcher v. Norton, 5 Ill. 575; Badlam v. Tucker, 1 Pick. 389; Woodman v. Chesley, 39 Me. 45; Homes v. Crane, 2 Pick. 607.

[2] Hall v. Snowhill, 2 Green. N. J. 8; Pratt v. Skolfield, 45 Me. 386; Lacey v. Giboney, 36 Mo. 320; Greene v. Dingley, 24 Me. 131; Burton v. Tannehill, 6 Black, 470.

upon the premises of the mortgagor in the night and seize the mortgaged property, if he can do so without violating the criminal law.[1]

§ 97. **What is sufficient Breach of Condition to entitle a Mortgagee to Recover Possession in Cases giving him the Right under the Mortgage, as where he feels Unsafe, Insecure, or the Property is Removed, etc.**—Mortgages, as we have seen, often contain provisions allowing the mortgagor to retain possession until default. They may also contain provisions that he shall retain possession until default, upon condition that, if the property, or any part thereof, shall be removed or disposed of by the mortgagor, or upon any attempt to remove or dispose of the property, or a failure to keep the same insured for the benefit of the mortgagee, or to pay the taxes upon the same, or if any part thereof shall be taken on legal process at the suit of any other creditor, then the mortgagee shall be entitled to the immediate possession of the property. Such conditions are legal, and may be enforced upon breach or default of any or either of them. Thus, where, by the terms of a mortgage, the mortgagor is to retain possession until condition broken, but with an express stipulation that if the mortgagor shall commit waste, or misuse, or attempt to secrete the property, the mortgagee shall be authorized to take immediate possession thereof, and before condition broken, executions were levied upon the property at the suit of creditors, under which the property was removed from the possession of the mortgagor, the mortgagee may maintain replevin for its recovery[2] from any person re-

1 Sutterwhite v. Kenney, 3 Strobh. 457; London Co. v. Drake, 6 C. B. N S. 768; McNeal v. Emerson, 15 Gray, 384.

2 Ashley v. Wright, 19 Ohio S. 291; Welch v. Whittemore, 25 Me. 86; Prior v. White, 2 Ill. 261; Conkey v. Hart, 14 N. Y. 22; Russell v. Butterfield, 21 Wend. 300.

moving it. So, the filing by the mortgagor of a voluntary petition in bankruptcy is an "attempt to sell," within the meaning of the usual clause in a mortgage.[1] So, if the mortgagor is attempting to remove the property out of the county, the mortgagee may obtain possession, though the debt be not due;[2] or, if he make an unconditional sale of the property,[3] where there are no such stipulations in the mortgage. Where the stipulation provides that he may take possession at any time that he feels "unsafe or insecure," the mortgagee may take immediate possession of the property wherever it can be found. A right to the immediate possession will accrue to the mortgagee at any time he may elect to assert it. But where a mortgage provides that, until default in payment, the mortgagor shall retain possession unless the mortgagee shall deem the property in danger of being sold, removed, etc., when he shall be authorized to take possession, the mortgagee, without any cause to believe the property is in danger of being sold or removed, and without default, is not entitled to recover possession; he must have a reasonable apprehension that it will be sold or removed.[4] If the mortgagor sell the property without knowledge of the mortgagee, the latter may maintain an action against the purchaser therefor.[5] If any of the stipulations as to payment of insurance or taxes are not complied with, it will entitle the mortgagee to enforce his right to the immediate possession of the property. As against all parties but the mortgagor, the mortgagee is entitled to possession of

[1] Moore v. Young, 4 Biss. 248.

[2] Russell v. Butterfield, 21 Wend. 400.

[3] Whitney v. Lowell, 33 Me. 318; Coles v. Clark, 3 Cush. 399.

[4] Furlong v. Cox, 77 Ill. 293; Skiff v. Solace.

[5] Bailey v. Godfrey, 54 Ill. 507; Braley v. Brynes, 21 Minn. 483; Welch v. Sackett, 12 Wis. 243; Frisbie v. Langworthy, 11 Wis. 375; Spriggs v. Camp, 2 Spears, 181; Fox v. Kitton, 19 Ill. 519; Coty v. Barnes, 20 Vt. 78; Huggans v. Fryer, 1 Lans. 276; Frost v. Mott, 34 N. Y. 253.

the property, even as against a tax collector who has distrained it after the making of the mortgage for a tax due from the mortgagor.[1] If a mortgage be given to indemnify a surety from his liability, and the mortgagor do not pay the money at the time stipulated, so that the mortgagee is exposed to suit, it is a breach of the condition of the mortgage.[2] Where a mortgage debt is payable in installments, the condition is broken by non-payment of the first installment.[3] Where notes which are secured by a mortgage are payable on demand (that is, where no particular time of payment is specified), and the property, by the condition of the mortgage, is to remain in possession of the mortgagor, the mortgagee is entitled to the possession of the property without demand; in such case the mortgagee may maintain an action to recover possession from any one who takes the property from the possession of the mortgagor.[4] But where there are two or more notes, payable at three and six months, and there is a stipulation in the mortgage that, until default in the payment of such two promissory notes at maturity, the mortgagor is to retain possession, a mortgagee cannot, before the maturity of the last note and default made in the payment, deprive the mortgagor of the possession of the property.[5]

The reader will note the distinction between the conditions in this case and those cited *supra*.

§ 98. **Is a Mortgagee Entitled to Possession, in the Absence of any Stipulations, before Forfeiture or Breach of Condition?**—In the preceding section we have seen in what cases the mortgagee is entitled to possession of the property, and when he

1 Fuller v. Way, 103 Mass. 481

2 Shaw v. Bond, 12 Mass. 447.

3 Reddick v. Gressman, 49 Mo. 389.

4 Howland v. Willett, 3 Sand. 607; Alden v. Lincoln, 18 Met. 204; Goodrich v. Willard, 2 Gray, 203.

5 McGuire v. Benort, 33 Md. 18.

may deprive the mortgagor, or any one holding under him, from the possession of the property where there are conditions or stipulations in the mortgage providing for such results. But the question as to whether the mortgagee has any right to possession before any default by the mortgagor, where the mortgage is silent, is a matter not yet uniformly agreed upon. In some States the statute provides that, in the absence of any provision in the mortgage, a mortgagee shall be entitled to possession; and, where such is the law, it becomes part of the contract, and courts must enforce the mortgagee's right. Outside of any statutory provision, the decisions are far from uniform, some taking the view that the mortgagee is, and others that he is not; and while it is utterly impossible to harmonize the decisions, we may establish a rule which will govern the rights of parties to such transactions. Our system of mortgaging having come more immediately from the civil law, it will be necessary to trace the matter back for a considerable period. The civil law made a distinction between pledges and things hypothecated or mortgaged. The pledge was then as it is at the present time, "when a thing is obliged for money lent and the possession passed to the creditor;" the hypotheca, or mortgage, "when the thing was obliged for money lent and the possession remained in the debtor." Then came the rule in regard to all conveyances, whether of lands or personal property, forfeiting and divesting the title of the mortgagor after the law day, which required a delivery of possession to the grantee, and consequently a change in the form of mortgages to obviate the forfeiture; then the statute of frauds and fraudulent conveyances, making void all conveyances of property in which possession was not delivered to the grantee,

which became the common law of England, and, by adoption, the common law of the United States. It was equally applicable to real estate and personal property. The result of the universal application of this doctrine was such as to create the utmost confusion in the books, and courts either could not or did not make or attempt to make any distinctions between pledges and mortgages, sales or assignments of personal property. The rights of the parties—pledgor and pledgee, vendor and vendee, and mortgagor and mortgagee—became confused, and the result has been a great variety of decisions; some courts deciding exactly the reverse of others; some modifying, some following, others distinguishing between a case and that at bar. Applying various decisions, it became difficult to tell what a chattel mortgage was. By some it was held a sale upon condition, others an assignment, others a pledge; then, more than a pledge—a sort of judicial combination of terms. Chancellor Kent gave a definition as follows: "A mortgage of goods is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge, but a mortgage of goods is, in certain cases, valid without delivery." This definition was given in 1805, in a case which, Chancellor Kent says,[1] was never decided by the court. Notwithstanding that, it is reiterated by him in another case, and has been adopted by many courts as a correct definition of a chattel mortgage, simply because it was announced by Kent without regard to the changes made in the statutes of that State since that time. Prior to 1833, this definition, under the common-law rule and the statute of frauds, was, to a great extent, correct; it has, by the many changes

[1] Barrow v. Paxton, 5 Johns. 260. See Cockcroft's Unabridged Table of Cases, vol. 1, page 492.

made in this class of instruments, become somewhat obsolete. So that a chattel mortgage is now an instrument whose validity as to creditors and purchasers is made to depend upon the strict compliance with the statutory requirements. While the rights of the mortgagee to subject the property to the satisfaction of his debt, and the mortgagor to have it sold for that purpose, is also a statutory requirement, it has become by legislative enactment a security which is not dependent upon any common-law principles any more than a mechanic's lien or any other species of security provided for by statute.

Since the enactment of the statute of frauds and fraudulent conveyances, the question of possession has, in cases where the statute applied, been a source of fruitful discussion. The history of the law respecting the rights of creditors in relation to the property of their debtor, sold, assigned or mortgaged by him, but remaining in his possession and under his control, is remarkable. It presents a perpetual struggle between a general rule of policy intended to cut off the possibility of fraudulent or collusive transactions; prescribing, either legislatively or judicially, that every sale, assignment or mortgage unaccompanied by change of possession should be held fraudulent in the eye of the law and void against creditors; and, on the other side, the obvious hardship and injustice of numerous particular cases where the innocent and even benevolent intention of the party was manifest, and the legal presumption of fraud appeared inequitable, oppressive, contrary to the truth of the case and the moral feelings of those who must apply the law. Thus it happened, in England and the various States of the Union, that while the courts and the books laid down the rule broadly, and often applied it strictly, that unless

possession accompanies and follows a transfer it is fraudulent and void; yet, first case after case, and then class after class, of exemptions followed, until these exemptions became the rule; the exemptions being such as the kind of sale, purchase under execution or distress for rent, necessity, convenience, the custom of trade, the distance or situation of the place, the relations of parties, motives of humanity or friendship, and numerous other special circumstances. Retention of possession being fraudulent, conveyances were declared valid only when the mortgagee obtained possession, or from the time he obtained possession, it became a principle of the common law that he was therefore in all cases entitled to possession. This doctrine as to retention of possession being conclusive evidence of fraud, has been adjudicated upon until the rule has become almost obsolete under the exemptions. In order to settle all the doubts and discrepancies, positive legislation was obtained, and a strict definition of what transactions should be fraudulent has been obtained. Prior to the period when legislative aid was invoked, all such transactions were controlled by common-law principles, and the statute of fraudulent conveyances, which is simply declaratory of the common law; and at common law the mortgagee was entitled to possession in order to establish one of the evidences of good faith. At common law there had been no system of registration which imparted notice to strangers in the manner and upon the plan of the present universal system as adopted in England and the United States, so that the common-law rule and the decisions thereunder were made irrespective of this system. The exceptions to the rule being so numerous and varied, it became necessary to adopt some uniform system by which all mortgages should be governed—one

that was and should be applied to all such instruments. While the common-law rule that an immediate, actual and continued change of possession should be necessary to the validity of a mortgage of personal property was re-enacted, another condition equally important, and, in fact, a substitute for delivery of possession, was also enacted—that of requiring a record of the mortgage in the town or county where the mortgagor resides or the property is located. The reason for the change of possession, as declared in Twyne's case, is that of preventing the grantor from obtaining a false and delusive credit by being in possession, and the actual use of property as if he were the owner thereof, free of any lien or incumbrance; that is, it prevented parties dealing with him from having any notice of the rights of the mortgagee, and to protect his right it was necessary for him to have possession of the property. This being the reason for the rule, registration was, and has since repeatedly been declared as, ample and complete notice to all the world of the rights of parties to any instrument duly recorded, and therefore that possession is not necessary to the validity of a duly registered chattel mortgage, but is of the same effect as if there was an immediate, actual and continued possession until the maturity of the debt and a default or breach of condition of the mortgage. The reason for the rule having been virtually abrogated by the enactment of the registration laws, the rule must necessarily fall with it, and therefore, possession not being a requisite to the validity of a registered chattel mortgage, a mortgagee is not entitled to it unless so provided for in the contract, or until such time as the stipulations in the instrument make any neglect of the mortgagor cause for obtaining possession.[1]

[1] Barrett v. Timberlake, 57 Mo. 499; Sheble v. Curt, 56 Mo. 437.

The distinction made by the civil law between pledges and hypothecations, or mortgages, is the only correct one. A mortgage of chattels is neither a pledge, in the literal legal sense of the word, nor is it more than a pledge, nor is it a sale; it is just what the courts of equity have declared it—a mere security, giving the mortgagee no rights in the property other than that of a lien-holder; the enforcement of his lien is a matter of pure statutory regulation, the same as a mechanic's lien, and is valid only when perfected in accordance with the statutory provisions. So that the common-law doctrine having been virtually abolished, except where made part of a statute, the common-law rights of the mortgagee must be considered as abolished with it. Another reason why a mortgagee is not entitled to possession until default is, that the transaction, by way of a mortgage, as distinguished from that of pledge, sale or assignment, is, in the very nature of the contract itself, opposed to a delivery of possession. If a delivery of possession is what the intention of the parties is when a transaction of this kind is made, a pledge, sale or assignment being the ordinary modes of expressing such intention, and as of constant use as chattel mortgages, the parties would not use, as a means of conveyance, an instrument which does not express their contract and their intention in making it. A mortgagor, in probably nine mortgages out of ten, never makes default in the payment of the mortgage debt, and in the tenth the mortgagee is compelled to pursue his statutory remedy to obtain possession and payment; in the latter case a rule is sought to be established by which all other transactions are to be governed. But when we look at the daily business of life out of court, another aspect of the question presents itself. Mortgages of personal property, as the stock and

implements of the mechanic or small manufacturer, the furniture of the innkeeper or householder, the team of a teamster, are constantly being made, leaving the property to be managed and disposed of by the mortgagor; in many cases such retention and management is the only means by which the mortgagor is enabled to satisfy the debt, and can it be said that, in the absence of any stipulation in the mortgage, the mortgagee shall have the right as soon as the mortgage is made to deprive him of the only means that will enable him to release his property? Such, surely, cannot be the effect of the registration laws.

In a late case in Indiana,[1] the Supreme Court lay down the doctrine, that the statute has made no change in the common-law rule in regard to the possession of the mortgaged property, in the absence of any stipulation to the contrary. If at common law there was no substitute for an immediate change of possession, and there has been one established by statute, surely the common-law rule has been essentially changed. In tracing the origin of the rule requiring a change of possession, we find that it rests upon the well-settled principle of notice to creditors and strangers. This is all that was intended by the statute of frauds and fraudulent conveyances, requiring a change of possession; and all that was required was, that the owner, grantor, or mortgagor should not be permitted to deceive and defraud others by remaining in possession of property which was incumbered by the liens of creditors, or sold and assigned to others by conveyances of which there could be no notice given other than that by an actual change of possession, and upon this the right and title of a mortgagee depended. But the statute of Indiana,

[1] Broadhead v. McKay, 46 Ind. 595.

concerning the registration of chattel mortgages, has dispensed with the necessity of a change of possession both as to notice and as regards the rights of a mortgagee, and has provided how he may obtain satisfaction: he may sell the property after default, but that does not imply that he is to have, or that he is to be entitled to, possession, prior to that time; he may obtain possession after default, either by the voluntary act of the mortgagor or by law; or, he may sue on his note, and have the property sold on execution: because he may sell the property is no reason why he is entitled to possession prior to the time when it may be sold; it may never become forfeited, and the rule that he is entitled to deprive the owner of it, in case of this kind, would be making an absolute sale out of a mortgage, instead of a security. Take the case of a drayman who, from sickness or misfortune, is compelled to borrow money to supply the necessaries of life; the only security he can give is a mortgage upon his horse, dray and harness, and, in fact, the only means he has of earning the money to repay the loan is the use of the very property mortgaged. It is true that he may stipulate for retaining possession, but suppose he executes a mortgage which has no such clause in it, or the mortgagee erases it from the instrument, or, relying upon the mortgagee to insert such a provision, he fails to insert it, and, within the ten days required by the statute in Indiana, he records the mortgage, the application of the common-law rule, as laid down by the Supreme Court of Indiana, would be the perpetration of a greater fraud upon the mortgagor than it was ever intended to suppress. The necessities of commerce, the usages of modern society, the conveniences of life, the wants and usages of trade, commerce, credit and industry have compelled the enactment of the registration laws, and a compliance with those laws has abolished

the necessity for the change of, and the mortgagee's right to, possession prior to the time when, in pursuance of his statutory right, he is entitled to subject the property to the satisfaction of the debt. So that where there are statutes providing first for change of possession, or registration, the length of time that a mortgage of personal property shall be valid, when and how it shall be satisfied, and how the security is to be made available to satisfy the lien or debt of the mortgagee, and the rights of the mortgagor to the surplus, if any, we have a mortgage that is a purely statutory security, governed by it and wholly independent of the common law, or any common-law doctrine, whenever the same conflicts, either directly or impliedly, with the statute. So that, where there is no provision, in the statute or the contract, entitling a mortgagee to possession, the intention and presumption of the law is that he is not entitled to it any more than if the property conveyed were real estate.

§ 99. **The Possession by the Mortgagor is not Adverse to that of the Mortgagee.**—A mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession of the mortgaged property before forfeiture; and where there are a series of defaults, as the non-payment of interest, taxes, or one or more of several notes, he is not bound to take possession on the first or subsequent default; he may wait until the whole debt matures,[1] and until such forfeiture by non-payment, the possession of the mortgagor cannot be adverse to that of the mortgagee, but must be in subordination to his rights.[2] A mortgagor may show, by parol evidence, that it was agreed he might retain possession.[3]

[1] Magee v. Carpenter, 4 Ala. 469.

[2] Joyner v. Vincent, 4 D. & B. 512; Martindale v. Booth, 3 B. & A. 498; Tapfield v. Hillman, 6 M. & G. 245; Conner v. Whitmore, 52 Me. 185.

[3] Pierce v. Stevens, 30 Me. 184.

# CHAPTER X.

## FRAUDULENT AND VOID MORTGAGES.

MORTGAGES GIVING THE MORTGAGOR THE RIGHT TO RETAIN AND DISPOSE OF THE MORTGAGED PROPERTY.—MORTGAGES WHERE THE RIGHT TO "DISPOSE" IS IMPLIED.—QUESTION OF FRAUD, HOW DETERMINED.—INTENT, HOW ASCERTAINED.—DISTINCTION MADE BY COURTS IN REGARD TO THIS CLASS OF MORTGAGES.—MORTGAGES WITH POWER TO SELL FOR BENEFIT OF MORTGAGEE.—FRAUDULENT AND VOID MORTGAGES.—MORTGAGES AS AFFECTED BY USURY.—MORTGAGES OF PERISHABLE OR CONSUMABLE ARTICLES.

§ 100. **Retention of Possession, and Sale of the Mortgaged Property by the Mortgagor. Effect of Provisions allowing a Disposal of the Property, and extending the lien of the Mortgage to that acquired with the proceeds of the Sales.**—Having attempted to trace the doctrine in regard to the delivery or change of possession required in ancient times to the modification of the principles applicable thereto, and the establishment by legislative enactments of the substitute for delivery of possession, and having ascertained the effect of a compliance or non-compliance with such provisions upon the rights of parties, we will now proceed to treat of the effect of a provision or permission permitting the mortgagor to sell and dispose of the mortgaged property, substituting other property therefor. While this subject is properly a part of that examined under the head of after-acquired property, how far bound by the lien of a mortgage, *ante* chapter III, it is properly treated of here, as a branch of the subject affecting the validity of

mortgages. In order to ascertain the effect of a provision allowing a mortgagor to sell and dispose of the mortgaged property we will have to consider a variety of cases, and the distinction made by courts in the use of the proceeds of such sales. As a preliminary matter it must be understood that the class of mortgages of which we are now treating have been executed in conformity with the statutory requirements, that is, duly recorded, acknowledged, etc., with no other change or delivery of possession than that of which registration is symbolical of. The object of all securities of this kind is to give a creditor a lien upon a specified article which is so definitely described as to give all the world notice of the lien by which it is encumbered. In case of the mortgage of an immovable, like a tract of land, a question of this kind could not arise; the mortgage being of record, and the land incapable of delivery, the lien of such a mortgage does not follow the land, but remains on and with the land, until satisfied or discharged by payment, or by the bar of the statute of limitations. With the class of property which is encumbered by a chattel mortgage this rule cannot be of so general application as in the case of real estate, for the reason that the transitory nature of a chattel will not permit it. The doctrine established both at law and equity, by which all persons other than the immediate parties to the transaction are to be affected, that of *notice*, is of almost universal application to real estate, but by reason of express statutory enactment inapplicable to chattel mortgages, their effect does not depend upon the question of notice, but on a compliance with the statute which declares all mortgages void as to creditors, unless in conformity with its requirements. So that while a purchaser of a tract of

land who has notice of an unrecorded mortgage will take it subject to such mortgage, or if the mortgage is of record cannot purchase the land free from such lien, unless it is satisfied at the time, a purchaser of a chattel which is mortgaged, and the mortgage is unrecorded or possession not delivered to the mortgagee, will take the property without any encumbrance or subject to any lien. The statute makes such a lien void. The effect of a duly executed chattel mortgage, where the mortgagor remains in possession, sells and disposes, replenishes and substitutes other like property for that encumbered, is a question upon which there has been some contrariety of decision. Where a mortgage of personal property is made in good faith, and it is duly recorded, such record as we have already seen is notice to all the world, and a mortgagee may follow and reclaim the property or any portion of it, whenever it may be taken.

In New Hampshire, Nebraska, and in other States, selling or removing mortgaged property by the mortgagor, without the consent of the mortgagee, is made a felony, and punishable by imprisonment and fine. This provision being a part of the statutory law, there are not many cases in those States wherein the question now under consideration ever can be raised. The salutary effect of this provision is evident from a comparison of the reports in those States where it is in force, with the reports of other States where the matter is one to be passed upon in courts upon trials between creditors and the mortgagee. In the former States judicial determinations that chattel mortgages are fraudulent and void by reason of the mortgagor's retaining possession and selling the property are rare, while in the other States such cases are being con-

stantly adjudicated. As a means for the prevention of litigation, and for protection not only of the rights of the mortgagee and the preservation of his lien upon the specific property encumbered, but as to creditors, we regard such statutory enactment as eminently proper and necessary.

Possession of mortgaged property by a mortgagor has always been regarded (prior to the registry laws) as indicative of fraud, while the selling of the mortgaged property by the mortgagor was conclusive evidence of it. Some of the courts have attempted to modify the general rule and draw distinctions in particular cases, some of the Judges stating that from the facts in the case and their *personal knowledge* of the mortgagor they knew that there was no fraudulent intention on the part of the mortgagor to defraud his creditors, or to hinder or delay them in the collection of their debts. Whenever a judge or a court attempts to distinguish some particular case from personal knowledge of the parties or of the facts as not coming under the general principles applicable to and governing such transactions, they but add to the confusion already existing, and aid in unsettling rather than in giving stability to well-settled principles of law and equity.

We have, in chapters VI and VII *ante*, treated of the effect of the retention of possession by the mortgagor, and also of the effect of the registry acts upon the necessity of a delivery of possession. There are few subjects which have been more discussed in the courts of this country, with less uniformity of decision than that of mortgages and sales of personal property without delivery of possession. Such contrariety of decision is the result of a class of cases which are decided by courts with regard to the person and in utter

disregard of principle; that is, they make a distinction in the person, not in the facts. Prior to the registration laws, and since the enactment of the statutes against fraud and fraudulent conveyances, the same contrariety of decision existed in regard to the effect of the retention of possession, and I have no doubt but that it had its origin in the same cause. Prior to the enactment of the registration statutes, manual delivery of the mortgaged property was essential to the validity of the transaction. These laws conferred upon the parties the right to retain or provide for the mortgagors retaining the property until default, provided the instrument itself be recorded. But the mere fact of its being recorded under the statute, does not necessarily make it good as against creditors. The registration acts do not validate mortgages which are invalid prior to being recorded. The acts are simply for the protection of creditors. The retention of possession by the mortgagor being consistent with the transaction will not have the effect of rendering the mortgage fraudulent *per se.* But the continuance of possession with a power of disposition and sale, either express or implied, is quite a different thing.

If chattel mortgages were formerly treated as invalid unless actual possession was surrendered to the mortgagee, they are not now, for modern legislation has conceded the right of the mortgagor to retain possession if the transaction is in good faith and on good consideration. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession.

But the mortgagee must take care that the mortgage does not contain provisions of no advantage to him, but which benefit the mortgagor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow a mortgagee to make use of his lien for any other purpose than his own indemnity. If he goes beyond this, and puts into the mortgage stipulations which have the effect to protect the property of the mortgagor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce such a mortgage. These principles are not disputed, but the courts of this country are not agreed in their application to mortgages containing such provisions. The cases cannot be reconciled by any process of reasoning, or on any principle of law. Thus to attempt to reconcile two cases like the following upon any principle or reason whatever, is among the impossibilities: "A., being desirous of disposing of his business, makes a sale of his entire stock in trade to B., who, to secure the purchase money, executes several notes and a mortgage to A., for the purchase money. The mortgage contains stipulations that B. is to retain possession of the mortgaged property, and to sell and dispose of the same, and the goods which may from time to time be purchased during the existence of the mortgage to replace any part sold, shall be subject to such mortgage, in action by the creditors of B.; the mortgage is held valid, because upon the facts there is no fraudulent intent; but in the following case, where it is stipulated that until default shall be made in the payment of the notes, the mortgagor is to remain in possession as heretofore, and sell and dispose of the property, and supply their places with other goods, and

the goods substituted by purchase for those sold shall be subjected to the lien of the mortgage." The mortgage upon its face is held fraudulent and void. In the first case, the mortgagor may be a prominent man, well known, with a good character, and a court or jury, upon his general reputation, would, knowing all the circumstances, declare that there was no fraudulent intent; but in the latter case, the mortgagor, no matter what his reputation or circumstances, is deemed guilty of fraud upon the general principles applied to all transactions of that kind. This state of things results from an endeavor not to reverse or overrule a well-settled principle, but the attempt of courts, while enunciating the doctrine, to draw a fine distinction which really does not exist, and to show their ability for nice and subtle distinctions between two cases of the same kind, depending upon precisely a similar state of facts, which is shown by the instrument itself. Well may it be said, "consistency, thou art a jewel." The author has felt it necessary, in giving his views of the law as it should be, to give, seemingly, some strange illustrations, but they are all taken from actual decisions, and are given to illustrate the results of a departure from the doctrine of *stare decisis*, where the principles are too well settled to be questioned.

More questions in regard to the validity and effect of chattel mortgages have depended upon the fact that the mortgage, either by a provision therein contained, permitted the mortgagor to remain in possession and sell and dispose of the mortgaged property, and replace or substitute other for it, allowing the mortgage lien to extend over it, or by consent, and perhaps collusion with the mortgagee, the mortgagor was permitted to sell and replace, as long as there was no interference or sus-

pected interference by creditors, in which event the mortgagee would take possession, ostensibly for his protection, but in reality for the benefit of the mortgagor.

"The object of a mortgage is to obtain security beyond a simple reliance upon the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept off by other creditors, by fastening a specific lien upon that covered by the mortgage. But a mortgage with possession and power of disposition in the mortgagor, is nothing at last but a reliance upon the honesty of the mortgagor, and in fact is no security, as it is within the power of the mortgagor, at any moment, to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage. Such a mortgage is no security, so far as the debtor is concerned, and is of no benefit, except to keep off other creditors. It may furnish a more specific remedy for the collection of the debt, but is not a specific and certain security at its inception. To hold such a mortgage valid, would enable a debtor to do business on a capital within the limits of the mortgage debt, at the will of the mortgagee, protected from the claims of all other creditors. Where the mortgage is to extend to all additions made to the property mortgaged, it gives the mortgagor an unlimited amount of capital to trade upon. To hold that a mortgage permitting a mortgagor to retain possession and dispose of the mortgaged property in the ordinary course of business, with a provision that the mortgage shall extend to all after-acquired property, instead of that disposed of, is valid, would furnish a complete shelter under which a man could carry on trade for his own benefit, completely protected against

the payment of his debts, and placed wholly beyond the reach of creditors. That the mortgagee should thus permit the mortgagor to transact business for his own benefit, and not proceed to collect the mortgage debt, would not be evidence of fraud which would authorize the mortgage to be defeated upon the ground that it hindered and delayed creditors, because the mortgage may have been honestly executed, and simple generosity, or good nature, or carelessness, in delaying the collection of a debt, cannot be regarded as a fraud which will defeat an honest security."

"It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The power is permitted in all States where the registration of chattel mortgages is provided for. It is consistent with the idea of security and may be for the accommodation of the mortgagor and as the only means of enabling him to satisfy the mortgage debt. But the power to dispose of the property for the mortgagor's benefit alone is inconsistent with the character of a mortgage, and of itself furnishes a pretty effectual shield to a dishonest debtor. "The very nature of a mortgage is to fasten a lien upon specific property; courts have gone far enough when they have permitted an honest possession in the mortgagor, because that opens a door by which an honest vendee may be defrauded by purchase without notice, which shows there was much reason in the rule adopted in the old case of Twyne. In the latter case there is no specific lien, but a floating mortgage which attaches, swells and contracts as the stock in trade changes, increases and diminishes, or may wholly expire by entire sale and

disposition at the will of the mortgagor. Such a mortgage is no certain security upon specific property. It all depends upon the honesty and good faith of the mortgagor, and as he might dispose of it to a creditor at will to satisfy a debt, there is no reason why a creditor may not seize it against his will for the same object. In such case the whole right to dispose of the property to pay a debt depends upon the will of the mortgagor, not affected by the rights of the mortgagee, and what reason is there in permitting the will of the debtor to determine whether property shall legally go to pay a debt or not? If it be the will of the debtor to appropriate the mortgaged property to pay the debt, it is binding as against the mortgagee; but if it be not the will of the debtor, and the property is seized upon execution, the rights of the mortgagee fastens upon the property and takes it away from the execution creditor. Then the property is not held by the mortgage, but the will of the debtor; because, if the debtor sees proper to dispose of it he has the power under the mortgage. He may dispose of the property, defeat the mortgage and put the money in his own pocket; but if he refuses to pay a debt, and you seize the property in execution against his will, the mortgage steps in and restores it to the debtor. The whole matter, then, appears to rest upon the option of the debtor to appropriate the mortgaged property to the payment of his debts or not, and not upon the mortgage. No reasoning will change this result, if a mortgagor retains possession and the full power of disposition over the mortgaged property."

"A mortgage upon a specific article, with possession and power of disposition left in the mortgagor, is, in truth, no mortgage at all; it is no certain lien. The power to hold possession and dispose of the property

is inconsistent with the very nature of a mortgage. It indeed would not, perhaps, be going too far to say that such an instrument was a nullity. It is next thing to a sale of a horse, with possession and power of disposition retained to the vendor. Except in the case of a mortgage, it would be contended that a time might happen when the mortgagee could assert possession; but before condition broken and possession taken, it would be hard to discover any difference. But at all events we have not the slightest hesitation in saying that a mortgage which secures possession and the full power of disposition in the mortgagor, until condition broken, will not hinder creditors from seizing property thus mortgaged on execution, and applying the proceeds to the payment of debts; nor will it prevent the mortgagor from assigning to pay debts, for he has the power of disposition by the instrument itself. As to all the world, except as to the parties themselves, such a mortgage will be held void, as against the policy of the law."[1]

Such mortgages enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It allows the mortgagor, under the cover of the mortgage, to sell the goods as his own and appropriate the proceeds to his own purpose. A mortgage, which in its terms, contemplates such results, besides being no security to the mortgagee, operates in the most effectual manner to ward off other creditors, and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.

[1] Collins v. Meyers, 16 Ohio, 547.

But many respectable authorities have held that a mortgage of a stock of goods with power to sell is valid.[1]

I am not disposed to adopt their reasoning or conclusions, as this matter has been fully treated of under the head of after-acquired property, *ante* chapter III, with the reasons for dissenting from the above decisions.

"It is said, in support of a fact of this sort, that although the articles mortgaged may be sold that others may be substituted in their place, and this may be done by consent of parties. This is no answer, for it may be that others will not be *substituted*, and if we look to experience in all cases, where a trader has felt himself bound to mortgage his whole stock, it is not the usual result."

"The whole error in these cases appears to be in regarding the word *stock* as a fixed thing, which must always remain the same, as a horse which preserves its identity, although in the process of time every particle composing him may be thrown off and renewed. And that the power of disposition in the mortgagor of stock in trade, is only the power to sell the old and replace it with new, and thus keep up the identity of the thing mortgaged, and then claim that such a mortgage is only the common case of a mortgage of a specific thing, with possession in the mortgagor until condition broken.

[1] Mitchell v. Winslow, 2 Story, 630; Jones v. Huggeford, 3 Met. 515; Briggs v. Parkman, 2 Met. 258; Codman v. Freeman, 3 Cush. 306; Googins v. Gilmore, 47 Me. 9; Hughes v. Corey, 20 Iowa, 399; Jessup v. Bridge, 11 Iowa, 572; Wilhelmi v. Leonard, 13 Iowa, 330; Torbet v. Hayden, 11 Iowa, 435; Levy v. Welsh, 2 Edw. Ch. 438; Stedman v. Vickery, 42 Me. 132; Gay v. Bidwell, 7 Mich. 519; Barnard v. Eaton, 2 Cush. 294; Oliver v. Eaton, 7 Mich. 108; Campbell v. Leonard, 11 Iowa, 489; Benton v. Thornhill, 7 Taunt. 149; Brinley v. Spring, 7 Me. 241; Abbott v. Goodwin, 20 Me. 408; Macomber v. Parker, 14 Pick. 497; Brett v. Carter, 3 Cent. Law J. 286.

The error is in treating a *word* as a *thing*, and mortgaging a word instead of a substance, and permitting the substance to be sold, while the mortgage attaches and remains fixed to the word. Except in the case of sale and re-supply, or wear and re-supply, with identity preserved under the noun *stock*, there is no confusion in the books, because it is not held anywhere that a mortgage of a specific thing, as a horse, with possession and power of disposition in the mortgagor, is valid against creditors. But the word stock has been treated as permanent and fixed, and the power of disposition as attaching to the goods which made up the stock, and that the stock must necessarily be re-supplied as fast as consumed."[1]

I therefore state, as a general principle of law, notwithstanding the decisions to the contrary, whenever a mortgage is made of an entire stock of goods in a store, which includes in its terms all articles of a like nature which may be in the store at the time of default or breach of condition, the mortgagor continuing in possession of the property and selling the same in the usual course of business, and making purchases from time to time to replenish his stock, it is fraudulent as against creditors.[2] So a mortgage by

[1] Collins v. Meyers, 16 Ohio, 547.

[2] Robinson v. Elliott, 22 Wall 513; Horton v. Williams, 21 Minn. 187; Place v. Langworthy, 13 Wis. 629; In re Manley, 2 Bond, 261; In re Kahley, 2 Biss. 383; Simmons v. Jenkins, 76 Ill. 479; Catlin v. Currier, 1 Sawyer, 7; Constantine v. Twelves, 29 Ala. 607; Butts v. Peacock, 23 Wis. 359; Billingsly v. Bunce, 28 Mo. 547; Nichols v. Hampton, 46 Ga. 253; Butnau v. Osgood, 51 N. H. 192; King v. Keenan, 38 Ala. 63; Armstrong v. Tuttle, 34 Mo. 432; Millburn v. Waugh, 11 Mo. 369; Spies v. Boyd, 1 E. D. Smith, 445; Goodrich v. Downs, 6 Hill, 438; Griswold v. Sheldon, 4 N. Y. 581; Welch v. Beckey, 1 Penn. 57; Reed v. Blades, 5 Taunt, 212; Worral v. Smith, 1 Camp. 332; Paget v. Perchard, 1 Esp. 205; McLachlan v. Wright, 3 Wend. 348; Ranley v. Blodget, 17 N. H. 298; Jordan v. Turner, 3. Blackf. 309; Divver v. McLaughlin, 2 Wend. 596; Read v. Wilson, 22 Ill. 377; Lang v. Lee, 3 Rand. 410; Farmers' Bank v. Douglass, 19 Miss. 469; Wood v. Lowry, 17 Wend.

which the mortgagor is allowed to manufacture, sell and enjoy the proceeds of the sales, though he is bound to keep an amount on hand equal to that mortgaged, is void as to creditors.[1] So, where a mortgagor purchases a stock of goods and executes a mortgage on them, and subsequently forms a copartnership with a third person, who furnishes goods of equal value, and a regular business is conducted, sales made in the usual course of trade, the stock replenished, and deficiencies supplied in the stock bought from the mortgagee, the property is not liable to the mortgagee's claim.[2] If, by any arrangement, express or implied, the mortgagee allows the mortgagor to continue in the sale of the mortgaged goods at retail, for his own benefit, the mortgage will be unavailing against a judgment creditor of the mortgagor, and such arrangement or

492; Barney v. Griffin, 2 N. Y. 365; Collins v. Meyers, 16 Ohio, 547; Freeman v. Rawson, 5 Ohio St. 1; Harman v. Abbey, 7 Ohio St. 218; Simpson v. Mitchell, 8 Yerg. 417; Coopers v. Woolf, 15 Ohio St. 523; Carpenter v. Simmons, 1 Robt. 360; Doyle v. Smith, 1 Coldw. 15; Edgell v. Hart, 9 N. Y. 213; Ford v. Williams, 13 N. Y. 575; Davis v. Ransom, 18 Ill. 396; Shaw v. Lowry, Wright (O.), 140; Meyer v. Gorham, 5 Cal. 322; Gardner v. McEwen, 19 N. Y. 123; Smith v. Acker, 23 Wend. 458; Ticknor v. Wiswall, 9 Ala. 309; Murray v. Riggs, 15 John. 571; Bishop v. Warner, 19 Conn. 460; Johnson v. Thweatt, 18 Ala. 141; Harris v. Sumner, 2 Pick. 129; Steinart v. Denster, 23 Wis. 136; Russell v. Winne, 37 N. Y. 591; Martin v. Rice, 24 Mo. 581; Hickman v. Perrin, 6 Coldw. 135; Miller v. Lockwood, 32 N. Y. 293; Conklin v. Shelly, 28 N. Y. 360; Addington v. Etheredge, 12 Gratt. 436; Walter v. Wimer, 24 Mo. 63; State v. Tasker, 31 Mo. 445; State v. D'Oench, 31 Mo. 433; New Albany Ins. Co. v. Wilcoxson, 21 Ind. 355; Mittnacht v. Kelly, 3 Keyes, 407; Yates v. Olmsted, 65 Barb. 43; Barnet v. Fergus, 51 Ill. 352; Brooks v. Wimer, 20 Mo. 503; Stanley v. Bunce, 27 Mo. 264; Martin v. Maddox, 24 Mo. 575; Bank, &c. v. Hunt, 11 Wall. 391; Gere v. Murray, 6 Minn. 305; Chophard v. Bayard, 4 Minn. 533; Montgomery's ex'rs v. Kirksey, 26 Ala. 172; Klapp v. Shirk, 13 Penn. 589; Connah v. Sedgwick, 1 Barb. 210; Butler v. Stoddard, 7 Paige, 163; Dewees v. Adams, 4 Edw. 21; Lockhart v. Wyatt, 10 Ala. 231; Nicholson v. Leavitt, 4 Sand. 252; Mead v. Phillips, 1 Sand. Ch. 83; Camp v. Camp, 2 Hill, 628; Harvey v. Crane, 2 Biss. 496; Perrin in re, 7 B. R. 283.

1 Rawlett v. Blodgett, 17 N. H. 298; Marston v. Vulte, 8 Bosw. 129; Edgell v. Hart, 9 N. Y. 213.

2 Anderson v. Howard, 49 Ga. 313.

permission may be shown by circumstances.[1] It is not the simple fact of possession by a mortgagor that will avoid the mortgage, but it is the possession with the power of sale which defeats the instrument, and the effect will be the same, although neither expressed nor necessarily implied from its terms.[2] If the right to possession and power of sale in the mortgagor appear upon the face of the instrument, it will be a fraud in law, but if it do not appear upon its face, but in evidence at the trial, it will be fraudulent in fact. The statute of fraudulent conveyances thus provides, upon principles of public policy, without regarding the actual intention of the parties. It is immaterial whether the power to sell the property is contained in the instrument or is conferred by a parol agreement made at the time of its execution. The latter, equally with the former, shows that it is not the *bona fide* intention of the parties, in giving and receiving the mortgage, to secure the debt. A mortgage of this kind is simply made and delivered with intent that it shall operate to cover property which is liable to the satisfaction of debts, and hinder, delay and defraud creditors by securing to the debtor the use and benefit of his property and its proceeds, while it protects it from levy and sale on judicial process. This agreement, like any other parol agreement, may be proved by direct evidence or by proof of facts and circumstances clearly showing it.[3]

1 Simmons v Jenkins, 76 Ill. 479; Horton v. Williams, 21 Minn. 187.

2 State v. D'Oench, 31 Mo. 433; State v. Tasker, 31 Mo. 445; Voorhis v. Langsdorf. 31 Mo. 451.

3 Frost v. Warren, 42 N. Y. 204; Williston v. Jones, 6 Duer, 504; Summers v. Roos, 43 Miss. 749; Burgin v. Burgin, 1 Ind. 453, Collins v. Myers, 16 Ohio, 547; Griswold v. Sheldon, 4 N. Y. 580; Deleware v. Ensign, 21 Barb. 85; Freeman v. Rawson, 5 Ohio S. 1; Russell v. Winne, 37 N. Y. 591; Robbins v. Parker, 3 Met. 117; Gardner v.

RULE IN THE NEW ENGLAND STATES.

In some of the New England States it is made a crime for a mortgagor to sell any of the mortgaged property without the consent of the mortgagee thereto in writing, and a verbal consent is no answer to an indictment under the statute against a mortgagor for the sale of such property.[1] The value of the property sold must be alleged in the indictment and found by the jury.[2] The statute making a mortgagor criminally liable for selling or conveying the property "without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged," renders the mortgagor liable when he complies with neither.[3]

In Massachusetts, where a similar statute is in force, it is held that its provisions have no obligation to the case of a contract between the mortgagee and mortgagor, or between the assignee of one and the assignee of the other.[4] The actual payment of money, and delivery of the property (in New Hampshire) to the purchaser is held to pass a valid title to him,[5] and so will a sale by the mortgagor with the consent of the mortgagee, even though such consent is not in writing, and if it is so, not entered or endorsed on the mortgage,[6] and the purchaser was not informed of the existence of the mortgage. But where the mortgagor sells part

McEwen, 19 N. Y. 123; Marston v. Vultee, 12 Abb. Pr. 143; New Alb. Ins. Co. v. Wilcoxson, 21 Ind. 355; Howerton v. Holt, 23 Tex. 60; In re Kahley, 4 B. R. 124; Barnet v. Fergus, 51 Ill. 352; Steinart v. Duster, 23 Wis. 136; Ross v. Wilson, 7 Bush. 29.

[1] State v. Plaisted, 43 N. H. 413.

[2] State v. Ladd, 32 N. H. 110.

[3] Commonwealth v. Damon, 105 Mass. 580.

[4] Hubbard v. Lyman, 8 Allen, 520.

[5] Gage v. Whittier, 17 N. H. 312.

[6] Roberts v. Crawford, 54 N. H. 532. Patrick v. Meserve, 18 N. H. 300; Stafford v. Whitcomb, 8 Allen, 518.

of the mortgaged property and converts the proceeds to his own use it is a fraud.[1] Any conveyance which is made for the use of a mortgagor is void as to creditors.[2] Many of these decisions were rendered in accordance with the statute of frauds. It has been held that the statute of frauds, providing that a conveyance of property made in trust for the use of the person making the same, shall be void as against creditors, does not apply to chattel mortgages.[3]

§ 101. **How the Question is to be Determined. When by the Court. When to be submitted to a Jury.**—When a mortgage of personal property contains a provision securing to the mortgagor the right of possession and selling or disposing of the property, without being obliged to apply the proceeds to the payment of the mortgage debt, or any other creditor, it is void upon its face. Where the illegality of the transaction stands out upon its face, upon the papers under which a mortgagor claims title, it becomes a question of the legal construction of the instrument, as in the following transaction, where B. bought of the plaintiff a stock of goods worth over $2,000, then in a store occupied by the plaintiff, and gave his notes therefor in sums of $100, payable monthly, and a mortgage on the goods for security. It was provided in the mortgage that, in case of nonpayment, or the attempt of the mortgagor

[1] Dickenson v. Cook, 17 John. 332; McNeal v. Glenn, 4 Md. 87; Park v. Harrison, 8 Humph. 82.

[2] Mackey v. Cairns, 1 Hopk. 373; Wilson v. Chesline, 1 McCord Ch. 233; Brown v. Donald, 1 Hill Ch. 297; Jackson v. Parker, 9 Cow. 73; Van Wyck v. Seward, 18 Wend. 375; Lukins v. Aird, 6 Wall. 78; Smith v. Smith, 11 N. H. 460.

[3] Godchaux v. Mulford, 26 Cal. 316; Curtis v. Leavitt, 17 Barb. 309.

or some one else, to remove, secrete, or sell the goods, the mortgagee might take possession thereof. A schedule of the goods, etc., was annexed to the mortgage, at the end of which was the following: "Together with all other articles mentioned and specified in a bill of sale this day executed by the party of the second part to the said party of the first part, and to include also all other articles of a like nature, which may be put, or which may be in said store, whenever said party of the second part may be entitled to enforce the within mortgage; said party of the first part not to sell any of the said goods upon credit. If any of the said goods are sold upon credit, that shall be sufficient cause of forfeiture of the within mortgage, and entitle said Edgell to treat the same accordingly at his election." B. took possession of the goods, and continued business more than a year, when they were levied upon by the defendant as sheriff. Held that the schedule of property annexed to the mortgage must be taken as part and parcel of it, and as qualifying its effect; and taking both papers together they show the transaction to have been illegal.[1]

In a mortgage containing such an arrangement between the parties, there can be no question as to the intention of the parties to be deduced from circumstantial proof. The law adjudges that they intended what their written agreement expresses, and it is incompetent for either party to show, if they were possessed of the most convincing proof, that they designed the instrument to have a different operation from that which the law assigns to it. As it is the duty of courts to respond to the law, and as the effect of such a condition

[1] Edgell v. Hart, 13 Barb. 380.

in a mortgage is a pure question of law, it is the duty of a court to decide whether the mortgagee can sustain an action on such an instrument as against creditors. If by law it is void as to creditors, the court is bound so to declare it. The question in such a case is whether a person engaged in trade and indebted can make a valid contract or conveyance in favor of one creditor, by which he shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, allowing the latter to sell and purchase like an unqualified owner, the lien attaching only to what may be on hand at the time it is sought to be enforced. That portion of the agreement which professes to subject after-acquired property is void upon the most common principles. A mortgage is an executed conveyance subject to a condition, and has all the elements of a sale. Like a sale, it requires a subject *in esse*, and in the power of the mortgagor, such a mortgage does not create a lien upon the property on hand at the time of its execution. It is not intended to create an absolute lien on any property, but a fluctuating lien which should operate to release that which is sold by the mortgagor, and to cover what he may purchase with the proceeds. The effect of such an arrangement is to defraud creditors by giving to the mortgagor a false credit, and being incongruous with a just and legal idea of a mortgage, is condemned by all courts, and such mortgages are declared fraudulent and void as to creditors, and it is the duty of courts so to declare them.[1]

[1] Robinson v. Elliott, 22 Wall. 513; Edgell v. Hart, 9 N. Y. 213; Place v. Langworthy, 13 Wis. 629; Steinart v. Duster, 23 Wis. 136; Horton v. Williams, 21 Minn. 187.

But where the question of intent is to be obtained by extrinsic evidence, it becomes a question of fact for a jury to find, and not to be inferred by the court.[1]

Where a mortgage contains no unlawful provisions, it can only be avoided for proof of fraud in fact, which is exclusively a question for a jury. If it were void on its face, it would be the duty of a court to pronounce it so; but a court cannot look at facts outside the instrument, and treat them when found by a jury as part of the instrument itself, or instruct the jury, if they find such facts, that the mortgage is void. The law cannot determine for a jury, that the showing in any given case conclusively establishes such fraudulent intent.[2]

§ 102. **Of the Exceptions to the rule as above laid down.**—As stated in the preceding chapter: There is no well-settled principle of law but that some court will and can be found which can exercise its ingenuity in making nice and subtle distinctions. Take the rule in Twyne's case. The exceptions became so numerous that they in fact became the law in many States, notwithstanding the statute of fraudulent conveyances. Another reason, perhaps, for these exceptions, is that the law-makers will add or strike out a

[1] Horton v. Williams, 21 Minn. 187; Gere v. Murray, 6 Minn. 305; Allen v. Wheeler, 4 Gray, 123; Ewing v. Gray, 12 Ind. 64; Maples v. Burnside, 22 Ind. 139; Banfield v. Whipple, 14 Allen, 13; Green v. Tanner, 8 Met. 411; Bagg v. Jerome, 7 Mich. 145; Jackson v. Mather, 7 Cow. 301; Tyrer v. Littleton, 2 Browne, 187; Crisp v. Pratt, Cro. Car. 549; Oxford's Case, 10 Co. 53; Marden v. Barbcock, 2 Met. 99; Ridgway v. Ogden, 4 Wash. 139; Charlton v. Gardner, 11 Leigh, 281; Kline v. Katzenberger, 20 Ohio S. 110; Ford v. Williams, 24 N. Y. 359; Miller v. Lockwood, 32 N. Y. 293.

[2] Bagg v. Jerome, 7 Mich. 145; Oliver v. Eaton, 7 Mich. 108; Gay v. Bidwell, 7 Mich. 519; Nye v. Van Husan, 6 Mich. 329; Orr v. Lacey, 2 Doug. (Mich.) 230; Booth v. McNair, 14 Mich. 19: Sutton v. Hanford, 11 Mich. 513.

word or two in copying a well-expounded law, so as to meet some peculiar case or class of cases, and the result is a series of irreconcilable decisions. It seems, however, to be well settled that the mere retention of possession of mortgaged property by the mortgagor is not *per se* fraudulent, whether so provided for by the mortgage or not, if it is recorded, which is effectually reversing the rule in Twyne's case (owing, no doubt, to statutory provisions), that the retention of possession and power of disposal at the will of the mortgagor without being accountable to any one for the proceeds, should be fraudulent, needs no argument to convince one, and that exceptions can be found to this rule cannot be doubted. In New York there was probably no one question which was kept going from one court to another with as little prospect of ever being settled, as the effect of the retention of possession by a mortgagor. Case after case was tried, exception on exception made, and when legislative aid was finally invoked, it took years to obtain a definite and settled construction of the statute, whether it was a question of law for the court or fact for a jury, and, after much discussion, it was enacted by the legislature that "The question of fraudulent intent in all cases arising under the provisions of the chapter on fraudulent conveyances shall be deemed a question of fact and not of law," which made the question of fraud one for the jury, and the apparent conflict of the decisions upon the validity of chattel mortgages is the result of the findings of juries upon the facts rather than exceptions by courts in particular cases, and in all cases decided by the courts of last resort in that State the verdicts of juries were not disturbed when the question was one under that chapter; so that their adjudications cannot be cited as an

authority in a State where the statute relating to fraudulent conveyances is not an exact and literal copy of the New York statute. So that the decisions depend upon the statute applicable to conveyances of this kind in each State, and courts which follow the decisions in the State of New York, based upon the finding of a jury, and applying them to cases tried without a jury under a different statute, cannot help making exceptions to the general rule. The general rule in regard to mortgages giving a power to sell and dispose of the mortgaged property by the mortgagor for his use and benefit, whether so expressed in the mortgage or by parol agreement between the parties, is that such a mortgage is absolutely void as to creditors, purchasers and subsequent mortgagees; they are void in their inception and consequently void in toto. A mortgagee who obtains possession of mortgaged property under a void mortgage is regarded as trespasser, having no rights whatever which creditors or purchasers are bound to respect. But some courts, while establishing and reaffirming these general principles, go still further and seek to make the exception, that where the mortgagee obtains possession of the mortgaged property under such mortgages as they declare fraudulent and absolutely void, such mortgagee is entitled to hold the property.[1]

In Michigan, the rule established is that such a mortgage is not necessarily fraudulent as to creditors. Being good between the parties, such a mortgage cannot be fraudulent on its face as against creditors, *since it would not show that there were any creditors*, or if it

[1] Read v. Wilson, 22 Ill. 377; Brown v. Webb, 20 Ohio, 389; and authorities cited *ante* in chapter III, under the head of mortgages conveying after-acquired property.

did, it would not appear but they had assented to it, or were themselves sufficiently secured. And that a creditor who does not show that he was such at the time of the giving of such mortgage is not in a position to attack it as fraudulent on the ground that it allows the mortgagor to remain in possession and dispose of the property.[1] Of what use could a mortgage be if there were no creditors? The property, if not exempt, would be liable. Mortgages are usually made in cases where there are creditors, not where there are none.

In Maine, if the mortgagor sells the goods mortgaged and left in his possession, and with the proceeds thereof purchases other goods, the last are held substituted for the first and subject to the lien of the mortgage. So, if the mortgaged property is exchanged for other, the property received in exchange is covered by the mortgage, if the mortgagee chooses to ratify the transaction.[2] In Illinois, that such a mortgage will invalidate the lien only as to the portion so permitted to be kept for purposes of sale.[3] That is, a mortgage may be good in part and bad in part, contradicting the rule that where there is fraud in a transaction it is void in toto.[4]

§ 103. **Of the Provisions in a Mortgage stipulating that the Mortgagor may retain possession and sell the property, accounting for and paying over the proceeds to the Mortgagee.**— There is a vast distinction made by some courts between mortgages where the power of sale is for the use and benefit of the mortgagor and mortgages where the

1 Gay v. Bidwell, 7 Mich. 519; Oliver v. Eaton, 7 Mich. 118.

2 Abbott v. Goodwin, 20 Me. 408.

3 Barnet v. Fergus, 51 Ill. 352.

4 Horton v. Williams, 21 Minn. 187.

sale is for the benefit of the mortgagee in satisfaction of the debt. As stated, in the former, it hinders, delays and defrauds creditors; in the latter, if *bona fide*, is beneficial to them. Where a mortgage stipulates that a mortgagor shall be allowed to sell and dispose of the property for the purpose of paying the mortgage debt, and he stipulates to apply the proceeds for that purpose, it is not held void upon its face, as where there is a provision in a mortgage, as follows: "And it is further agreed between the parties hereto that until the (amount) and interest is repaid the said parties of the first part shall remain in possession of said goods as agents of the party of the second part, and shall well and truly account to the said party of the second part, their assigns, monthly, for all sales made by them of the aforesaid property, hereby mortgaged, until said sum shall be fully paid and satisfied; the intention of the parties being that the sale of the property herein specified be absolute to the said party of the second part until said indebtedness shall be fully paid, with interest; said parties of the first part acting only as the agents of the said party of the second part in disposing of the goods hereinbefore mentioned and accounting for the proceeds thereof until said indebtedness is paid." If carried out in good faith, such provisions certainly would not hinder, delay or defraud creditors. It is the legitimate purpose of securities of this kind that the property shall be applied to the satisfaction of the debt; as the mortgagors have control of the property, there being no actual continued change of possession, they can only dispose of it for the purpose of

liquidating secured debts; it will be a fraud on creditors if sold for their own use and benefit.[1]

Such a stipulation is a strong badge of fraud, and the evidence to overcome this presumption should be almost conclusive.[2]

The mortgagee in such case is bound by the agreement he has entered into. He creates the mortgagor his agent and authorizes him to sell the mortgaged property and account monthly, weekly or daily (as the case may be) until the debt is paid. So far as creditors are concerned the mortgagor's acts are to be considered as the act of an agent and not of a mortgagor, and his acts will affect his principal accordingly. All moneys received from sales are in legal effect received by the mortgagee, not because the sales are a fraud upon creditors, but because they are made by authority of, and for the benefit of, the mortgagee, and the mortgagor is as much an agent as a third person or stranger would be. The *bona fides* of the transaction under the statute in New York must be a question for a jury. Almost all the cases cited above were tried by jury, and

1 Metzner v. Graham, 57 Mo. 404; Adler v. Claflin, 17 Ioa. 89; Abbott v. Goodwin, 21 Me. 408; Ostrander v. Fay, 3 Abb. N. Y. App. Dec. 431; Ford v. Williams, 24 N. Y. 359; Miller v. Lockwood, 32 N. Y. 293; Frost v. Warren, 42 N. Y. 204; Pond v. Clark, 14 Conn. 334; Foster v. Perkins, 42 Me. 162; Conkling v. Shelly, 28 N. Y. 360; Hawkins v. Nat. Bank, 1 Dill. 462; Vide opinion in Robinson v. Elliott, 22 Wall. 513; White Mt. Bank v. West, 46 Me. 15; Veazie v. Holmes, 40 Me. 69; Cutter v. Copeland, 18 Me. 127.

2 Johnson v. Curtis, 42 Barb. 588; Summers v. Roos, 43 Miss. 749; Adler v. Claflin, 17 Ia. 89; Brinley v. Spring, 7 Me. 241; Spence v. Bagwell, 6 Gratt. 444; Davis v. Rawson, 18 Ill. 396; Allen v. Smith, 10 Mass. 308; Barker v. Hall, 13 N. H. 293; Hickman v. Perrin, 6 Coldw. 135; Chophard v. Bayard, 4 Minn. 533; Weaver v. Joule, 3 C. B. (N. S.) 309; Pope v. Wilson, 7 Ala. 690; Constantine v. Twelves, 29 Ala. 607; Melody v. Chandler, 12 Me. 282; Wiswall v. Ticknor, 6 Ala. 178.

the courts of Ohio and other States, irrespective of the statute, are adopting the same principles.[1]

Where a mortgagee permits the mortgagor to remain in possession for the purpose and with the power of selling, and the transaction is in good faith, such mortgagee will be chargeable as against other creditors with the amount sold by the mortgagor, whether applied on the debt or not.[2] The lien of the mortgagee is extinguished from the time of sale, and he must look to the personal responsibility of his agent, the mortgagor, who has promised to pay over all proceeds.[3] Where a mortgage embracing personal property was given to secure certain debts due to the mortgagee, and liabilities assumed for the benefit of the mortgagor, who was permitted to retain possession and appropriate it to satisfy the claims secured by the mortgage, he, in fact, paid therewith as large a proportion of such claims as could have been paid from the avails of such property if it had been sold by the mortgagee. Under such circumstances it was held that the mortgagee had not lost his lien, and that subsequent mortgagees had no ground of complaint, as they took their securities subject to the payment of the claims which had thus been satisfied.[4] So it has been held that where the parties to a mortgage execute an agreement which is endorsed on the instrument, that if the mortgagor should sell any of the property, the mortgagee should discharge all

1 Kleine v. Katzenberger, 20 Ohio S. 110; Ford v. Williams, 24 N. Y. 359; Miller v. Lockwood, 32 N. Y. 293; Conkling v. Shelly, 28 N.Y. 360; Hughes v. Cory, 20 Ia. 399; Gardner v. McEwen, 19 N. Y. 123; Ostrander v. Fay, 3 Abb. N. Y. App. Dec. 431; Hickman v. Perrin, 6 Cold. 135.

2 Smith v. Ely, 10 B. R. 553; Conkling v. Shelly, 28 N. Y. 360; Miller v. Pancoast, 5 Dutch. 250; White Mt. Bank v. West, 46 Me. 15.

3 White Mt. Bank v. West, 46 Me. 15.

4 Pond v. Clarke, 14 Conn. 334.

claim thereon upon receipt of the money therefor. The agreement being conditional it gives no authority to the mortgagor to divest the mortgagee's title by a sale, but upon performance of the condition by payment of the purchase money to the mortgagee.[1] And where the mortgagor is daily selling the property, and supplying himself with other property of a similar kind, the presumption is that the mortgagee has waived his privilege of taking the property upon failure to pay, and he cannot reclaim it from the hands of purchasers.[2] Where the mortgagor reserves the right in a mortgage to sell all the property which is in excess of the amount of the debt secured, the valuation to be determined by mutual agreement, or by three disinterested persons agreed upon by the parties, the mortgagor cannot sell the excess upon his own valuation, but only in the manner provided by contract.[3]

It is not inconsistent with a transaction in the nature of a mortgage, or with good faith, that a mortgagee in person or by an agent should be permitted to sell the property for cash, and apply the money which is realized from such sale to the satisfaction of the mortgage debt. Still, an arrangement of this kind may be merely colorable and a device to protect property against the pursuit of other creditors. While a mortgage with an arrangement of this kind may justly be regarded with great suspicion, and juries apt to consider it fraudulent, it may be made in good faith; and whether it is fair or fraudulent is a question of fact for a jury to determine. While the law does not absolutely condemn a transaction of this kind, it submits the question of good faith to a jury.

1 Whitney v. Haywood, 6 Cush. 82.

2 Ogden v. Stewart, 29 Ill. 122.

3 Middletown Bank v. Dubuque, 19 Ioa. 467.

OBJECTIONS TO THIS DOCTRINE.

While this doctrine seems to have obtained the sanction of many respectable courts, upon the ground of *good faith* in the transaction, there are, notwithstanding, serious objections to it. In the first place, a mortgage of this kind opens a wide door for fraud. Every experienced judge knows that a real debt of some amount is usually resorted to, and wielded as the most deadly instrument of fraud. The practice of which I am speaking is called among the people at large *covering property.* A friendly creditor is commonly resorted to, because he holds a debt which will make the *best cover*, leaving such of the insolvent's property as is exempt by statute from execution, and the debt is used to *cover* all the rest. It is generally large enough to cover it all; if it be not or cannot be made large enough, there are generally some articles which can be eloigned or concealed, money, choses in action, and other light and portable things. The latter are frequently taken away by connections or intimate friends, with the assent and connivance of the debtor. He is thus apparently stripped, reduced to such an appearance of beggary as will excite sympathy in the breasts of a humane jury, and then produced as a witness on the stand to prove the covering debt a fair one, etc. He can always be made a competent witness by a release, and is generally so without one. As the transaction is for his benefit, there is great danger he may perjure himself. He is sure to make the debt as large as his conscience will allow. He generalizes; he remembers debits, but forgets credits, insomuch that the very persons he is struggling to defraud are often deceived into a belief that the debt is very much larger

than it is. Transactions like this are common. Debts are sometimes created by a collusive trial and recovery, or a collusive arbitration, in which the debtor and his friendly creditor appear as angry and adverse litigants. In short, they have the whole field of device and imposition to themselves, and they generally succeed partially or wholly, unless the defrauded creditors are allowed to insist on the retention and sale as a reply to the glossings and colorings of the transaction. The arrangement is a mere covenant and promise to sell the goods to other persons, and account for the proceeds to the mortgagee. This the mortgagor may or may not do, just as he pleases; there is no compulsion about it, no liability. He may sell the entire property to one or a dozen persons, and never account, to the mortgagee, for any of the proceeds. The power to sell is a part of the contract of security; there is, in reality, no agency about it. It is a reservation of the original dominion and power inherent in the owner of the goods, and by the terms of the contract can be executed in spite of the mortgagee, and cannot by him be revoked or superseded. Such a paper is no notice to the world that the goods are mortgaged, and that the mortgagor cannot impart a good title, free and unencumbered from the lien of his mortgage. On the contrary, it is notice to all the world, and as especially to purchasers, that the mortgagor is the only party who can impart a good title. Such a paper cannot be a mortgage. It is better to declare occasional transactions, like those cited above, to be void and illegal, than by relaxing a hearty moral and legal rule, open the flood-gates of general corruption.

Take the case from the 20th Ohio State Reports: "The mortgage contained the following provision: The

mortgagor to retain possession of the goods and chattels, but on any default of payment or any attempt of said mortgagor to sell said goods and chattels (*except in the usual retail way, and that he will then pay over the money received therefor to the mortgagees as the goods are sold*), or remove them from the county, or from their present location, or upon any seizure of them by any process of law, or upon any failure to comply with the provisions contained in the second covenant of this mortgage, then the said mortgagees may take them into their possession," which mortgage, by three judges against two, was held not to be void upon its face, and dependent upon the finding of a jury. There is quite a difference between the conditions of this mortgage and that first above set forth, where the mortgagor stipulates that he is merely agent, and a still greater distinction between that and an ordinary chattel mortgage, where the agreement to account and pay over to the mortgagee rests in parol, and is a matter of extrinsic evidence, entirely outside the provisions of the mortgage. There are, in fact, three classes of cases: The first where the entire transaction is shown by the instrument itself; the second where it is partly in writing and partly in parol; the third where the mortgage is entirely silent, and the whole question is one of fact for a jury. The latter class are the New York cases, which, by statutory provision, are made to depend for their validity upon the finding of a jury. In Massachusetts, parol evidence is inadmissible to show an oral agreement that the mortgagor shall retain the right to sell.[1]

[1] Clark v. Houghton, 12 Gray, 38.

The second is an exception to the general rule as laid down by the Supreme Court of the United States, in Robinson v. Elliott, 22 Wall. 513, and without any finding of good faith in complying with its conditions, and is one of the simplest devices to prevent creditors from subjecting the property to the satisfaction of their claims, as it allows the mortgagor to sell until such time as there is any danger from creditors, when the mortgagees may at once take possession, and deprive them of all remedy against the property, as was established in the cases of Chapman v. Weimar, 4 Ohio S. 481, Kleine v. Katzenberger, 20 Ohio S. 110, while in the case first cited, 1 Dill. 462, the mortgage on its face shows an intention on the part of the mortgagors to make the property encumbered the means of satisfying the mortgage debt, and the evidence adduced proved that nearly the whole of the mortgage debt had been paid by the proceeds of the sales made of the mortgaged property. That is in fact all the mortgagees could have done had they taken possession of the property and sold it; and in nine cases out of ten a mortgagor, if allowed to sell the property, will obtain a better price and pay more debts with the proceeds than the mortgagee or an officer selling under legal process can. So that the only rule in fact that can be laid down which will apply to all cases of this kind, whether the contract is express or implied, is to submit the matter to the jury and let them determine from the evidence whether the transaction is an honest one, carried out in good faith by the parties, and where sales have been made under such a power, that the proceeds thereof must be credited upon the mortgage debt, whether ever paid to the mortgagee or not, and the amount of the mortgage debt satisfied to the extent of

the amount of the property sold, and that the mortgage is a lien only for the balance. Such a construction is not only reasonable but just, in all cases where the good faith of the transaction is established.

RULE IN SUCH CASES.

That this rule is the only correct one in cases of this kind must be evident from the fact that mortgages giving the power to sell are, as a general rule, made to encumber stocks of goods, wares and merchandise, where there is no specific description of the property, as all the stock in trade in a certain store, describing its location, with a general description of the character or nature of the property in which the mortgagor is dealing. The character of his property is the necessary consequence of his business, and necessarily is constantly changing. The items of goods on hand on any given day, as on the day of the execution of the mortgage, will not, if the business of buying and selling be continued, be the same on any other or subsequent day. Though the quantity of goods in the store might be increased by purchase, the articles mortgaged must, of course, be constantly diminishing by sales; so that at the end of a month there would be no absolute certainty that any single item of the mortgaged property remained; and yet such an indefinite and general description will cover just as well an entirely different and even a larger stock of goods of the same character as it did the goods on hand at its date. So that at the time the mortgagee takes or attempts to take possession, the property upon which he took a lien has been sold and disposed of, and an entire change been made in it. The mortgagor, in place of paying over the pro-

ceeds, or purchasing the new stock therewith, has disposed of the money to his own advantage, and renewed the stock by purchasing on time. If there ever is a case where the maxim is applicable that "no man shall take advantage of his own wrong," it is in a case of this kind. Courts will not permit a mortgagor to sell the mortgaged property, and to place it beyond the reach of the mortgagee[1] and the control of the court. Equity will protect his rights, and if a mortgage is made in good faith the mortgagee will and can take prompt and effective measures to prevent such a disposition of the mortgaged property; if it is not, then, by allowing the mortgagor to sell, he should suffer the loss and not the creditors; and his loss being occasioned by the dishonesty of his agent in the disposal of the property, he should look to the agent alone for his redress. If he has trusted in the honor of the mortgagor to pay over the proceeds, creditors should not be postponed on that account. So that in place of declaring the mortgage void it should be declared satisfied and discharged, which will deprive him of any remedy beyond that which he may have against his agent. In New York the good faith of the transaction being by statute a question of intent to be ascertained by a jury, parol evidence in regard to oral agreements permitting a mortgagor to sell is admissible as indicative of the good faith of the parties. But in those States where such statutory provision has not been enacted, the rule laid down in Massachusetts seems to be the most conducive to transactions of this kind, and that is to that parol evidence is *inadmissible* to show an oral agree-

[1] Chapman v. Hunt, 2 Beasl. 370; Dock Co. v. Mallory, 1 Beasl. 94. Parsons v. Hughes, 12 Md. 1; Long

ment that the mortgagor shall retain the right to sell or exchange the mortgaged property.[1]

Parol evidence is inadmissible to vary the conditions of a mortgage,[2] and should be to control its construction or effect. Evidence of a fraudulent intent supersedes the whole enquiry into the *bona fides* of the consideration, for no merit in any of the parties can save it if it carries extrinsically or intrinsically the plain characters of fraud.

It is greatly to be regretted that the rules of law on so material a point, and one of such constant application, are so various and so fluctuating in this country. With the enactment of statutes granting a most liberal exemption of personal property, and the abolishment of the laws for the arrest and imprisonment of debtors, a creditor has but a naked claim against the property of his debtor, and it should receive the most effective support, and every rule calculated to prevent a debtor from secreting or covering property should be sustained with courage and energy. There is the same reason for the inflexible stability of the principle of law that a vendor of chattels should not, at the expense of his creditors, sell them, and yet retain the use of them, as there is for that well-settled and beneficial principle that a trustee shall not be permitted to buy or speculate in the trust fund on his own account, or for that salutary and fixed doctrine that the voluntary settlement of property shall be void against existing creditors. Such rules are made to destroy the very temptation to fraud in cases and modes that are calculated to invite it, and because such transactions may be grossly

[1] Clark v. Houghton, 12 Gray, 38.

[2] Adair v. Adair, 5 Mich. 204; Hunt v. Bloomer, 5 Duer, 202; Townsend v. Empire Co., 6 Duer, 208.

fraudulent, and the injured parties unable to show it from the character of private agreements and the infirmity of human testimony. However innocent such transactions may be in the given case, they are dangerous as precedents and poisonous in their consequences, and the wise policy of the law connects disability with the temptation, and thus endeavors to prevent impositions which might be inaccessible to the eye of the court. If a debtor can sell his personal property, and yet, by agreement with the purchaser, continue to enjoy it for six years as in one State, or for sixteen months in another in defiance of his creditors, who can set the bounds to the term of enjoyment, or know when or where to bestow credit, or how is he to make out a case of actual fraud? Fraud, in fact, is reluctantly drawn by a jury, and their sympathies assent to the existence of a fraudulent intent which is so difficult to ascertain and frequently so painful to infer.

§ 104. **Mortgages that are Fraudulent as to Creditors.**—It is a well-settled principle of law that conveyances which are made to hinder and delay creditors are wholly void as to them, though founded on a valuable consideration.[1] In order that a conveyance of property shall be void and fraudulent as to creditors, the fraudulent purpose must be shared both by the

[1] Bozman v. Draughan, 3 Stew. 343; Pulliam v. Newberry, 41 Ala. 168; Rogers v. Evans, 3 Ind. 574; Poague v. Boyce, 6 J. J. Marsh, 70; Reed v. Carl, 11 Miss. 74; Trotter v. Watson, 6 Humph. 509; Peck v. Land, 2 Ga. 1; Chandler v. Van Roeder, 24 How. 224; Mosely v. Garnier, 10 Tex. 393; Walcot v. Brander, 10 Tex. 419; Mills v. Howeth, 19 Tex. 257; Rich v. Levy, 16 Md. 74; Tripp v. Vincent, 8 Paige, 176; Beal v. Williamson, 14 Ala. 55; Crowningshield v. Kittredge, 7 Met. 520; Robinson v. Holt, 39 N. H. 557; True v. Congdon, 44 N. H. 48.

grantor and grantee.[1] While the object of a mortgagor is fraudulent as to creditors, yet if a mortgage is made to secure a *bona fide* debt, the mortgagee having no notice of any fraudulent intent, will be protected.[2]

But an intent on the part of the mortgagee and mortgagor to defeat the creditors of the latter, will render the mortgage fraudulent and void as to creditors.[3] And this though such mortgagee may pay a full consideration and take actual possession of the property.[4] The transaction is *mala fide*, and the conveyance to him is utterly void as to creditors.[5] And if, by reason of a fraudulent intent as to part, as where a stock of goods and buildings are mortgaged together, and the mortgagor is allowed to sell for his own use and benefit the stock of goods, the mortgage, being fraudulent as to the goods, is fraudulent as to all the property therein described.[6] So, where a creditor takes

[1] Herkelrath v. Stookey, 63 Ill. 486; Splawn v. Martin, 17 Ark. 146; Partelo v. Harris, 26 Conn. 480; Ewing v. Runkle, 20 Ill. 448; Meixsell v. Williamson, 35 Ill. 529; Hesing v. McCloskey, 37 Ill. 341; Fifield v. Gaston, 12 Ia. 218; Steele v. Ward, 25 Ioa. 535; Brown v. Force, 7 B. Mon. 357; Brown v. Smith, 7 B. Mon. 361; Harrison v. Phillips, 12 Mass. 456; Bridge v. Eggleston, 14 Mass. 245; Foster v. Hall, 12 Pick. 89; Kittredge v. Sumner, 11 Pick. 50; Byrne v. Becker, 42 Mo. 264; Bancroft v. Blizzard, 13 Ohio, 30; Union Bank v. Toomer, 2 Hill Ch. 27; Weisiger v. Chisholm, 28 Tex. 780; Leach v. Francis, 41 Vt. 670; Governor v. Campbell, 17 Ala. 566; Magniac v. Thompson, 1 Baldw. 344.

[2] Hall v. Arnold, 15 Barb. 599; Rose v. Coble, Phill., 1 N. C. L. 51; Tripp v. Vincent, 8 Paige 176; Stover v. Herrington, 7 Ala. 142; Astor v. Wells, 4 Wheat. 466; Lee v. Abbe, 2 Root, 359; Brown v. Riley, 22 Ill. 45; Blodgett v. Chaplin, 48 Me. 322; Palmer v. Henderson, 20 Ind. 297; Ewing v. Cargill, 21 Miss. 79; White v. White, 13 Ired. L. 265; Pierson v. Torn, 1 Tex. 577; Pope v. Andrews, 1 S. & M. Ch. 135.

[3] Beal v. Williamson, 14 Ala. 55.

[4] Rich v. Levy, 16 Md. 74.

[5] Robinson v. Holt, 39 N. H. 557.

[6] Russell v. Winne, 37 N. Y. 591; Denny v. Dean, 2 Cush. 160; Young v. Pate, 4 Yerg. 164; Summerville v. Horton, 4 Yerg. 541; Goodrich v. Downs, 6 Hill, 439; Grover v. Wakeman, 11 Wend. 194; Fulton Bank v. Benedict, 1 Hall, 480; Jackson v. Packard, 6 Wend. 415; Rice v. Welling, 5 Wend. 595; Hammond v. Hopping, 13 Wend. 505; Ticknor v. Wiswall, 9 Ala. 305; Burke v. Murphy, 27 Miss. 167; Mackie v. Cairnes, 5 Cow. 547; Tucker v. Welsh, 17 Mass. 164.

a mortgage covering certain property beyond what is necessary to satisfy the amount due, leaving nothing to satisfy a judgment which was shortly expected to be rendered against the mortgagor, such mortgage is fraudulent and void.[1] So a mortgage given for a larger sum than is actually due, and in excess of the value of the property, where there is nothing to show that it is intended to cover future advances, is void as to creditors, especially where it is made by a debtor in failing circumstances.[2] Taking such a mortgage from a debtor known to be in failing circumstances, and to be pressed by his creditors, is conclusive evidence of an intent to hinder and delay those creditors, because such is its natural and necessary effect. And a party is not to be heard to say that he did not intend what he knows to be the natural consequences of his actions. The question whether there was a fraudulent intent is, undoubtedly, generally one of fact, because it is to be arrived at from the existence of other facts which tend to show it. And whether such other facts exist in any particular case or not, is for the jury.

But whether such other facts, when conceded to exist, are sufficient to indicate conclusively an intent to hinder and delay creditors, is a question of law. Where a mortgage is impeached for fraud, in that the execution of it was obtained through false and deceitful representations, the mortgagee may prove that the mortgagor executed the same of his own accord, and without solicitation on the mortgagee's part, as facts and circumstances disproving the allega-

[1] Thompson v. Drake, 3 B. Mon. 565.

[2] Butts v. Peacock, 23 Wis. 359; Pettibone v. Griswold, 4 Conn. 158; North v. Belden, 13 Conn. 376; Hart v. Chalker, 14 Conn. 77; Bailey v. Burton, 8 Wend. 339; Youngs v. Wilson, 24 Barb. 510; Divver v. McLaughlin, 2 Wend. 596.

tions of fraud. The weight to be given to such evidence is altogether a question for the jury.[1] Mere folly without fraud is no foundation for equitable relief. A binding contract, obtained without misrepresentation, can never be set aside.[2] A note and mortgage, securing the price of property sold through the vendor's fraudulent misrepresentations as to its value, is not void.[3] While a mortgage may be illegal and void, it does not follow that the debt cannot be recovered.[4] For a mortgage in fraud of creditors is good between the parties.[5] A conveyance voidable on account of fraud or covin, may be made valid and effectual by matter *ex post facto*.[6] So a deed not fraudulent at first may become so afterwards.[7] Where a mortgage and note are executed, and after the record of the mortgage the note is delivered to the mortgagor, and is found in his possession at the time of his death, it is a strong pre-

[1] Butts v. Peacock, 68 N. C. 121.

[2] Milnes v. Cowley, 8 Price, 626.

[3] Sanborn v. Osgood, 16 N. H. 112.

Shaver v. Bear River, &c. Co., 10 Cal. 396; Haven v. Low, 2 N. H. 13.

[5] Upton v. Craig, 57 Ill. 257; Cocke v. Trotter, 10 Yerg. 213; Beach v. Rogers, 1 Root, 244; Bencher v. Cook, 1 Root, 296; Cushwa v. Cushwa, 5 Md. 44; Jordan v. Fenno, 13 Ark. 593; Lenox v. Notrebe, Hempst. 251; Rochelle v. Harrison, 8 Port. 351; Lawton v. Gordon, 34 Cal. 36; Chapin v. Pease, 10 Conn. 69; Stores v. Snow, 1 Root, 181; Ward v. Enders, 29 Ill. 519; Findley v. Cooley, 1 Blackf. 262; Moore v. Meek, 20 Ind. 484; Welby v. Armstrong, 21 Ind. 489; Wilson v. Hoor, 15 Ia. 489; Stewart v. Dailey, O. Litt. 212; Bull v. Harris, 18 B. Mon. 195; Ellis v. Higgins, 32 Me. 34; Harvey v. Varney, 98 Mass. 118; Stevens v. Harrow, 26 Ia. 458, Burrows v. Alter, 7 Mo. 424, Hill v. Pine River Bank, 45 N. Y 300; Jackson v. Cadwell, 1 Cow. 622; Robinson v. Stewart, 10 N. Y 189; Brown v. Webb, 20 Ohio, 389; Smith v. Gibson, 1 Yeates, 291; Buehler v. Gloninger, 2 Watts, 226; Sheik v. Endress, 3 W. & S. 255; Murphy v. Hubert, 16 Pa. 50; Huey's App., 29 Pa. 219; Sumner v. Murphy, 2 Hill (S. C.), 488; Neely v. Wood, 10 Yerg. 486; Epperson v. Young, 8 Tex. 135; Martin v. Martin, 1 Vt. 95.

[6] Verplanck v. Sterry, 12 John. 536; Doe v. Howland, 3 Cow. 277; Wood v. Jackson, 8 Wend. 16; Whelan v. Whelan, 3 Cow. 537.

[7] Sands v. Hildreth, 2 Johns. Ch. 35.

sumption against the *bona fides* of the transaction.[1] Or where the validity depends upon registration, and the mortgagee, without any fraudulent intent, merely as a personal favor, fails to record it at the proper time, as where A., on the twenty-second of March, 1845, mortgaged all his personal estate to B., to secure the latter against a liability of $6,000, incurred on his account. B. did not record this mortgage, but at the request of A., and in order to gratify him in a desire to avoid the discovery of his temporary embarrassments, kept it from record, and caused it to be renewed from time to time, at periods usually within twenty days, until the fourth of June, 1846, when, hearing of the extent of A.'s liabilities, and believing the enrolment thereof necessary for his security, he caused the last renewal to be recorded on the eighteenth of the same month on which it was executed. During this time A. remained in possession of the property, and no new consideration passed from B. to him after the fourth of September, 1845. Between the third of January and twenty-fifth of November, 1845, A., as trustee of the female complainant, received large sums of the trust funds, of which $12,000 were received by him in the months of October and November, 1845. This money not having been invested, and A., failing to bring the same into court in compliance with an order passed the twenty-ninth of June, 1846, another trustee was appointed in his place, who, on the twenty-fourth of July following, caused writs of *fieri facias* to be issued upon said order against A., which were defeated by the above-mentioned mortgage. The complainants then filed their bill to vacate this deed as either fraudulent in fact, or

[1] Bullock v. Narrott, 49 Ill. 62; Nat Bank, &c v. Sprague, 20 N. J. Eq. 13 Hanford v. Obrecht, 49 Ill. 146.

as void constructively, by reason of the provisions of the registration acts. Held, that a party cannot be permitted to take a bill of sale, or mortgage of chattels from another, for his own security, leave the mortgagor in possession, and ostensibly the owner, and at his request, and to keep the public from a knowledge of its existence, withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it, by placing the last renewal upon record, to the prejudice of others, whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him; that, as no new considerations passed between the parties since the mortgage of the fourth of September, 1845, all the mortgages since then were mere renewals or continuations of the one executed on that day, and viewed in this light, that the registration on the eighteenth of June, 1846, was not in time; that this mortgage, therefore, was fraudulent and void.[1]

A failure to record a mortgage, while it does not have the effect of hindering and delaying creditors, is a method of deceiving and defrauding them, so that as to them an unrecorded mortgage is fraudulent and void,[2] and a record of a mortgage in one county, while the property is, at the time of its execution in another, is void as to subsequent mortgagees, creditors and purchasers.[3]

[1] Gill v. Griffith, 2 Md. Ch. Decis. 270.

[2] Bird v. Wilkinson, 4 Leigh. 266; Forest v. Tinkham, 29 Ill. 141; Lockwood v. Seevin, 26 Ind. 124; Stephens v. Barrett, 7 Dana, 257; Wilson v. Leslie, 20 Ohio, 161; Helm v. Logan, 4 Bibb. 78; Sidener v. Bible, 43 Ind. 230; Leland *in re*, 10 Blatch. 503; Jacoway v. Gault, 20 Ark. 190; Graff v. Harding, 48 Ill. 148; Pond v. Skidmore, 40 Conn. 213.

[3] Lame v. Mason, 5 Leigh. 520.

The mortgage should be recorded in the county where the property is. A mortgage of personal property not delivered, which is not filed, is void as to *bona fide* creditors, whose claims arise while the neglect to file continues, although the unfiled mortgage cannot be legally questioned until the creditor obtains judgment and execution. A creditor to take advantage of this neglect to file need not have become such during the default, although the mortgagee must.[1]

§ 105. **Usury. How it affects Mortgages.**— The usury laws of the various States being subject to continuous changes, and there being no two alike, it will not be within the scope of this work to give all the adjudications upon questions arising out of usurious bargains. But what are given will indicate the law in the various States from which the decisions are taken. In some of the States a lender forfeits the whole amount, in others the interest, and in others a penalty of two or three times the amount of interest is forfeited. So that it is almost impossible to give any rule in regard thereto, unless the statute of each State be given, and the decisions thereunder, and being subject to change, the decision of one year may be wholly inapplicable to the statute of another. A mortgage may be declared void for usury,[2] in New York void only as against other liens.[3] What the effect of a usurious loan will be is to be determined by local statute; it may be set up as a defense in action to foreclose.[4] Where it is set up as defense to a mortgage, strict proof of

1 Thompson v. Van Vechten, 27 N. Y. 568; Wilson v. Leslie, 20 Ohio, 161.

2 De Butts v. Bacon, 6 Cranch. 252.

3 Thompson v. Van Vechten, 27 N. Y. 568; Denning v. Bristol, 1 Root. 171; Leslie v. Hoffman, 1 Edm. Sel. Cas. 475.

4 Cowles v. Woodruff, 8 Conn. 351; Cox v. Douglass, 12 Ia. 185; Owlten v. Grimstead, 4 J. J. Marsh, 608.

the usurious contract alleged is necessary.[1] But as to who may set it up as a defense outside of the mortgagor, is a question not so easily determined. The decisions are not uniform. In Iowa it is held that a subsequent mortgagee cannot plead it.[2] In New York without paying or offering to pay the amount actually due or advanced, for which such previous security was given.[3] In other States he may.[4] So it is held a purchaser taking mortgaged property subject to the lien and payment of the mortgage, cannot set up the defense of usury against such mortgage, neither can any subsequent arrangement between the mortgagor and the purchaser affect the mortgagee's lien to the full extent conferred by his mortgage.[5] In equity, payments made on a usurious contract, to an amount within that of the debt, and legal interest, will be as payments generally.[6]

While the exaction of usurious interest will not, in many States, invalidate the mortgage given to secure the payment of the debt, nor impair the right of the mortgagee to subject the property to sale in satisfaction of his debt. The courts, in adjusting the claims, will

[1] Richards v. Worthley, 5 Wis. 73.

[2] Powell v. Hunt, 11 Ia. 430.

[3] Rexford v. Widger, 3 Barb. Ch. 640.

[4] Pickersgill v. Brown, 7 La. 298; Whittacre v. Fuller, 5 Minn. 508; Campbell v. Hall, 16 N. Y. 575; Gordon v. Hobart, 2 Sumn. 401; Green v. Tyler, 39 Penn. 361; Green v. Kemp, 13 Mass. 515; Brolasky v. Miller, 1 Stockt. 807.

[5] Hartler v. Harrison, 24 N. Y. 170; Frost v. Shaw, 10 Ia. 491; Post v. Dart, 8 Paige, 641; Shufelt v. Shufelt, 9 Paige, 145; Cole v. Savage, 10 Paige, 591; Bassett v. McDonald, 13 Wis. 444; Fertis v. Crawford, 2 Denio, 598; Morris v. Floyd, 5 Barb. 130; Sands v. Church, 6 N. Y. 347; De Wolf v. Johnson, 10 Wheat. 392; Green v. Morse, 4 Barb. 335; Rexford v. Widger, 2 N. Y. 431; Green v. Kemp, 13 Mass. 515; Bridge v. Hubbard, 15 Mass. 103; Reading v. Weston, 7 Conn. 413; Stein v. Indianapolis, &c. Ass., 18 Ind. 237; Sellers v. Bottsford, 11 Mich. 59; Perry v. Kearns, 13 Ia. 174; Gerther v. Alexander, 15 Ia. 470; Huston v. Stringham, 21 Ia. 36; Halsey v. Reed, 9 Paige, 446; Marsh v. Pike, 10 Paige, 595; Cornell v. Prescott, 2 Barb. 16; Blyer v. Mulholland, 2 Sand. Ch. 478; Ferris v. Crawford, 2 Denio, 590; Rusell v. Pistor, 7 N. Y. 171.

[6] Ward v. Sharp, 15 Vt. 115.

adjust the amount of interest, and the proceeds to the extent of such usury will be applied to the payment of the debt and subsequent claims,[1] and it will be held a valid security for the principal debt.[2] It is competent for a mortgagor from whom usury has been exacted to waive it in whole or in part,[3] but the holder of a usurious mortgage cannot, even with the assent of the mortgagor, apply partial payments to the unsound part of his mortgage for the purpose of keeping alive that part which is valid to the prejudice of an existing subsequent mortgage,[4] and the transfer of a mortgage as security for a usurious loan does not avoid the mortgage nor discharge the mortgagor from his liability thereon; the payment of the usurious loan relieves the mortgage from all taint.[5] But if A. borrows money from B. at usurious interest, and procures an assignment of a note and mortgage from C. to B. to secure his loan, the security in B.'s hands is vitiated by usury.[6] Where the consideration of a mortgage is partly made up of usurious interest the mortgage will not, because such interest could not be recovered at law, be declared fraudulent as to creditors.[7] After foreclosure it is too late to attempt to impeach a mortgage for usury.[8] Where

1 Borum v. Fouts, 15 Ind. 50; Trumbo v. Blizzard, 6 G. & J. 18; Brolaski v. Miller, N. J. Eq. 807; Chamberlain v. Dempsey, 9 Bosw. 212; Brooke v. Morris, 2 Cin. (Ohio) 528; Vesey v. Ockington, 16 N. H. 479; Powell v. Hopkins, 38 Md. 1: Walker v. Cockey, 38 Md. 75; Warfield v. Ross, 38 Md. 85; Post v. Dart, 8 Paige, 639; Shufeldt v. Shufeldt, 9 Paige, 137; Brooke v. Avery, 4 N. Y. 225.

2 Grimes v. Doe, 8 Blackf. 371; Walter v. Lind, 16 N. J. Eq. 445; Turner v. Culvert, 12 S. & R. 46; Wycoff v. Longhead, 2 Dall. 92.

3 Fenwick v. Ratcliffe, 6 Mon. 154.

4 Greene v. Tyler, 39 Penn. 361.

5 Warner v. Governeur, 1 Barb. 36; Pearsal v. Kingsland, 3 Edw. Ch. 195.

6 Donnington v. Meeker, 3 Stockt. 362.

7 Spencer v. Ayrault, 10 N. Y. 202.

8 Rublee v. Chaffey, 8 Vt. 112; Thacher v. Gammon, 12 Mass. 268; Mumford v. American, &c. Co., 4 N. Y. 463; Adams v. Barnes, 17 Mass. 365.

the defense of usury is set up and established, a mortgagee will not be aided by a court of equity; he will not be allowed to invoke its process in his favor.[1]

§ 106. **Mortgages of Property Consumable, and of Perishable Property.**—If a mortgage includes perishable articles, or articles consumable in their use, it is an indicia of fraud.[2]

If the mortgagor is allowed or permitted to use them, or consume them, it is fraudulent and void. But the simple fact that property mortgaged is in part perishable, does not avoid the mortgage, but may be considered by the jury on a question of fraud.[3] If they can be kept without damage until the mortgage debt matures it will not be a badge of fraud that they are included in a mortgage.[4] Perishable articles, when included with other property in a mortgage, may, when it is for the benefit of the mortgagee, be used or consumed by the mortgagor, as where it is for the improvement, support or sustenance of the other property.[5] The amount in number and value of such perishable articles, as compared with the balance of the property mortgaged, may be so inconsiderable as to

[1] Owlten v. Grimstead, 4 J. J. Marsh. 608.

[2] Elmes v. Sutherland, 7 Ala. 262; Hurter v. Foster, 4 Humph. 211; Harvey v. Pack, 11 Miss. 229; Farmers' Bank v. Douglass, 19 Miss. 461; Potter v. McDowell, 81 Mo. 62; Darwin v. Handley, 3 Yerg. 502; Simpson v. Mitchell, 8 Yerg. 417; Richmond v. Curdup, Meigs. 581; Planters', &c. Bank v. Clark, 7 Ala. 765; Ewing v. Cargill, 21 Miss. 79; Ravisies v. Alston, 5 Ala. 297; Googins v. Gilmore, 47 Me. 9; Somersville v. Horton, 4 Yerg. 541; Wiley v. Knight, 27 Ala. 336; Johnson v. Thweat, 18 Ala. 741.

[3] Gerrey v. White, 47 Me. 504.

[4] Dewey v. Littlejohn, 2 Ired. Eq. 495; Cochran v. Paris, 11 Gratt. 348; Charlton v. Lay, 5 Humph. 496: Robbins v. Parker, 3 Met. 117.

[5] Ravisies v. Alston, 5 Ala. 297; Cochran v. Paris, 11 Gratt. 348; Planters' Bank v. Clark, 7 Ala. 765; Dewey v. Littlejohn, 2 Ired. Eq. 495.

justify the conclusion that they were embraced through carelessness or mistake of the parties; in such cases the mortgage will not be vitiated.[1] The doctrine that a mortgage of perishable property will avoid it, is confined to that class of property which is transient in its existence, or of such a nature that its only use consists in its consumption.[2]

[1] Cochran v. Paris, 11 Gratt. 348; Dewey v. Littlejohn, 2 Ired. Eq. 495.

[2] Shurtleff v. Willard, 19 Pick. 202.

# CHAPTER XI.

## MORTGAGES AS AFFECTED BY THE BANKRUPT LAW.

PROVISIONS OF THE BANKRUPT LAW RELATING TO CONVEYANCES IN THE NATURE OF CHATTEL MORTGAGES.—SECTIONS, 5021 AND 5128, OF THE REVISED STATUTES.—CONSTRUCTION OF THESE SECTIONS.—INTENTION OF THE BANKRUPT LAW.—TRANSFERS THAT ARE VOID.—WHAT WILL MAKE A MORTGAGE FRAUDULENT.—RIGHTS OF THE ASSIGNEE.—OF CREDITORS.—SELLING PROPERTY SUBJECT TO MORTGAGE.—SALE FREE FROM THE LIEN.—RIGHT OF MORTGAGEE.

§ 107. While treating of the validity and effect of chattel mortgages, it becomes important to ascertain, after an examination of the matters, which will render a mortgage valid or void under State laws, and examine the effect of a law which is paramount to all State laws, and its operation upon transfers of personal property by way of mortgage. There have been a great variety of decisions in regard to the construction of the bankrupt law, both by the Federal courts and the State courts. When the law was first promulgated, some of the Federal judges undertook, not only to oust all the State courts of any jurisdiction over the property of debtors, but did in many cases interfere after vested rights had accrued to creditors; and while some of the State courts were too cowardly or imbecile to assert their rights, others were not, and finally the Supreme Court of the United States, whenever cases have been brought before it, expounded and construed the law with some regard to the rights of creditors and the jurisdiction of State courts. Every right acquired by a vigilant creditor was declared a fraudulent preference,

and in many cases when a pressed debtor could have, by the pecuniary assistance of friends, been so relieved that bankruptcy could have been averted, and the debtor benefited instead of being ruined, bankrupt courts would declare such loans as no better than an ordinary unsecured debt, and in many cases fraudulent, because the security was given and the debt contracted within the time specified by the act; and while it may have been a relief to many who were beyond assistance at the time of its passage, it has been an instrument of oppression to as great a number, and in the hands of a few large mercantile houses a great source of fraudulent transfers. It has been declared that "the intention of the bankrupt law was to prevent all preferences by an insolvent person; and, as far as possible, to insure the equal distribution of his property to his creditors. It was intended to disarm the vigilance of creditors, generally, by declaring that no vigilance can be rewarded by a preference, if obtained contrary to its provisions within four months prior to the filing of the petition. It undertakes to disable creditors from procuring preferences within that period by attachment, mortgage or confession of judgment. It must be so administered as to suppress illegal preferences, or it necessarily operates as a fraud upon the rights of the mass of creditors, who in good faith refrain from seeking advantages contrary to its provisions and policy."[1] In regard to the application of the bankrupt law to chattel mortgages, it is only operative when it is sought to set a mortgage aside as being a preference to the mortgagee in opposition to the act.

[1] Markson v. Hobson, 2 Dill. 327

§ 108. **Statutory Provisions applicable to Chattel Mortgages.**—There are two provisions or chapters under the title of bankruptcy in the Revised Statutes of the United States, known as chapter three, relating to involuntary bankruptcy, and chapter eight, which, as amended, are specially applicable to chattel mortgages. They were known in the bankrupt act of 1867, as sections thirty-five and thirty-nine, but are now numbered 5128 to and including 5031, and section 5021; such portions as are important are as follows: Section 5021, chapter three, provides among other things "that any person residing and owing debts, as aforesaid, who, after the passage of this act, * * * * shall make any assignment, gift, sale, conveyance or transfer, of his estate, property, rights or credits, either within the United States or elsewhere, with intent to delay, defraud or hinder his creditors, * * * * or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights, credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties or otherwise, or with the intent of such disposition of his property to defeat or delay the operation of this act; * * * shall be deemed to have committed an act of bankruptcy. The section further provides, that the petition must be filed within six months after one of the acts of bankruptcy therein specified shall have been committed. And if the party be adjudged bankrupt for any of the causes above set forth, that the assignee may recover

back the money or property so paid, conveyed, sold, assigned or transferred, contrary to the bankrupt act, provided that the person to whom such payment or conveyance was made had reasonable cause to believe that the debtor was insolvent and knew that a fraud on the act was intended." This section is highly remedial, and should be liberally construed. It is not to be construed strictly, as if it were an obscure or special penal enactment. The act establishes a system, and regulates in all their details the relative rights of debtor and creditor. It does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such an act must be construed according to the fair import of its terms, with a view to effect its objects and to promote justice.[1] Its scope and purpose are to oblige insolvent traders to take the benefit of the bankrupt act, and thus to insure an equal distribution of their estates under its carefully-framed provisions.[2]

This provision and the chapter on prohibited and fraudulent transfers, chapter VIII, sections 5128, 5129, 5130 and 5131, of the present Revised Statutes, and the amendments of June, 1874, which section was known as section thirty-five, of the Laws of 1867, and has been

1 Locke *in re*, 2 B. R. 382; Muller *in re*, 2 B. R. 329; Silverman *in re*, 4 B. R. 523; Bump on Bankruptcy, 7 Ed. 365.

2 Diblee *in re*, 3 Ben. 283; Locke *in re*, 2 B. R. 329; White v. Raferty, 3 B. R. 221.

transposed in the revision, being of a somewhat similar nature, will be set forth before giving any of the adjudications under the law. Section 5128 provides as follows: If any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent and (knowing) that such attachment, sequestration, seizure, payment, pledge, assignment or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. (And nothing in said section thirty-five [5128] shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of making such loan.)

Section 5129, which was originally part of section thirty-five, provides, if any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to believe

him to be insolvent, or is acting in contemplation of insolvency, and (knowing) that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

There is an amendatory section which provides that in cases of involuntary or compulsory bankruptcy, the period, four months, mentioned in section thirty-five (5128) of the act to which this is amendatory, is changed to two months; and in the cases aforesaid, the period of six months mentioned in said section thirty-five (5128) is changed to three months. The original section thirty-five is still further subdivided into the two following sections: 5130. The fact that such payment, pledge, sale, assignment, transfer, conveyance or other disposition of a debtor's property as is described in the two preceding sections is not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud. And section 5131: Any contract, covenant or security made or given by a bankrupt or other person with, or in trust for, any creditor for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt shall be void; and any creditor who obtains any sum of money or other goods, chattels or securities from any person as an inducement for forbearing to

oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt; and shall also forfeit double the value or amount of such money, goods, chattels or security so obtained, to be recovered by the assignee for the benefit of the estate.

§ 109. **Construction.**—The word conveyance in the bankrupt act is a generic term including all proceedings to dispose of or incumber property in derogation of the equality of creditors, with intent by such disposition to give a preference or to defeat or delay the operations of the act. It includes mortgages.[1]

The words "sale, assignment, transfer or conveyance," employed in the preceding provisions, are of comprehensive import and embrace almost every disposition of property whether absolute or conditional. Both the antecedent provisions refer to and are designed to protect the property of the insolvent, and the clause as to fraud is designed to the same end. All these provisions relate to the same subject-matter, viz., the property, and all these aim to protect the property from fraudulent disposals. Although this clause is found at the close of the paragraph which declares certain conveyances fraudulent when made within a certain specified time, and is not at the close of the preceding paragraph which declares certain conveyances in preference of creditors and others fraudulent if made within two months, it applies to transfers under both paragraphs.[2]

Sections thirty-five and thirty-nine of the United States Bankrupt Law, as they are now numbered in the United States Revised Statutes, sections 5021

[1] Bingham v. Frost, 6 B. R. 130.

[2] Scammon v. Cole, 3 B. R. 393; Driggs v. Moore, 3 B. R. 602; Babbitt v. Walburn, 1 Dill. 19.

and 5128 to 32, are very nearly related to each other in their provisions, and must be construed together in *pari materia*. Section 35, or 5128, in express language applies equally to voluntary and involuntary cases of bankruptcy. Therefore, all the qualifications and conditions prescribed by section 5128, not inconsistent with the provisions of section 39, or 5021, will apply to proceedings under the latter section; and all the qualifications, conditions and prohibitions of section 5021, so far as they relate to the same class of matters provided for by section 5128, and are not inconsistent with its provision, will apply to proceedings under section 5128.[1]

The bankrupt law does not define the terms "insolvency or in contemplation of insolvency," but the courts having jurisdiction under the act of congress have construed the terms. Insolvency, as used in this act, does not mean an absolute inability to pay one's debts, at a future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do, without reference to the amount of his property.[2] No precise rule can be laid down which will be applicable to all cases, inasmuch as each case rests largely upon its own peculiar facts; there is no better general rule to govern courts, where they are considering the facts of the case, than that given. It is neither too broad nor too narrow, while

1 Tonkin *in re*, 4 B. R. 52; Richter *in re*, 1 Dill. 186; Black *in re*, 2 Ben. 196; Wadsworth v. Tyler, 2 B. R. 247; Hubbard v. Allaire Works, 7 Blatch. 284; Collins v. Gray, 8 Blatch. 483; Bean v. Brookmire, 1 Dill. 24.

2 Merch. Nat. Bank, v. Truax, 1 B. R. 146; Randal *in re*, 3 B. R. 4; Gay *in re*, 2 B. R. 358; Wilson v. Brinkman, 2 B. R. 468; Hardy v. Clark, 3 B. R. 468; Stranahan v. Gregory, 4 B. R. 427.

it would be quite too narrow and restricted to hold that a failure to pay some one debt when due is evidence of insolvency. In all cases under the act, whether a single instance of nonpayment of a debt at maturity would be evidence in a given case of insolvency, depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question.

A different course would ignore the usage and course of business recognized between the debtor and creditor class in that particular locality, and would present the spectacle of the mercantile class saying the trader is solvent, and the courts saying he is insolvent; whereas, the courts should adopt the mercantile usage as the rule of decision. The question is, whether the debtor is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence, it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, he is *prima facie* insolvent; whereas, in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence in London, Paris or New York, is not evidence of insolvency everywhere.[1] The same rule as to insolvency does not apply to a farmer as to a trader.[2] The first section of chapter eight, 5128, is designed to defeat a preference to a creditor, while the second is designed to defeat any transfer

[1] Driggs v. Moore, 3 B. R. 149; Potter v. Coggeshall, 4 B. R. 19; Wager v. Hall, 16 Wall. 581.

[2] Miller v. Keyes, 3 B. R. 224; Shafer v. Fritchery, 4 B. R. 548.

of property. To make a transfer void, the following facts must concur: 1st. The debtor making the transfer must be insolvent. 2d. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor. 3d. In any event, the person receiving the transfer must have reasonable cause to believe the person making the transfer was insolvent. 4th. And knowing that such transfer was made in fraud of the provisions of the bankrupt law. 5th. The transfer or conveyance must be made within the period of time specified before the filing of the petition by or against the bankrupt.[1]

§ 110. **Preferences Deemed Fraudulent.**—The whole theory of the bankrupt law is to prevent preferences. Every case must be decided on its own facts, and it will not be possible to lay down any general formula applicable to all cases. The intent to prefer a creditor necessarily involves the idea of an expectation of paying some others less than their whole debt, and this expectation is not always proved by the proof a known insolvency. There must be a fear or anticipation of stopping payment, which indeed may often be inferred from insolvency, or from acts which have a tendency to produce it, but which is to be decided as a fact in each case. A sweeping rule should not be adopted prohibiting insolvent persons from borrowing money on a mortgage, even of their stock in trade, or of requiring mortgagees to see to the application of the money they lend.[2]

1 Toof v. Martin, 13 Wall. 40; Foster v. Hackley, 2 B. R. 406; Hunt *in re*, 2 B. R. 539: Street v. Dawson, 4 B. R. 207; Haughey v. Albin, 2 Bond. 244; Scammon v. Cole, 4 B. R, 257; Forbes v. Howe, 102 Mass. 427.

2 Packard *in re*, Low Dec. 523.

The preference at which the law is directed can only arise in the case of an antecedent debt. A mortgage given for a consideration passed at the time of its execution, and also to secure a pre-existing debt being void in part as to the pre-existing debt, is void as to the whole.[1] A mortgage given to secure money to the debtor for the purpose of taking up certain notes for which the mortgagee was liable as indorser, cannot be sustained as a present consideration. If it could be, all an indorser or surety need do, to obtain a valid security for his liability, would be to lend his principal the amount with which to pay the debt, and receive back a mortgage as security for the loan. Such a proceeding, within the purview of the bankrupt act, is nothing more than an exchange or substitution of securities, a mere attempt and contrivance to relieve or protect an indorser or surety, and whatever means may be adopted to accomplish this purpose, it will prove invalid under the bankrupt law when it is designed and used to obtain a preference for the party who is under a liability for the bankrupt. Under such circumstances the security would in all respects have been equally valid, if it had been so drawn, as in terms to indemnify the indorsers or sureties on the notes for which they are liable.[2] Mortgages by insolvents to creditors, where the intent to give a preference and the existence of insolvency are apparent, or where the transaction is out of the usual course of business, are void.[3] The inevitable consequence of a mortgage upon a

[1] Tuttle v. Truax, 1 B. R., 360; Tiffany v. Boatmen's Inst., 18 Wall, 388.

[2] Scammon v. Cole, 3 B. R., 200; Cockingham v. Morgan, 7 Blatch. 480.

[3] Rison v. Knapp, 1 Dill 186 · Graham v. Stark, 3 Ben. 520; Tuttle v. Truax, 1 B. R. 166; Palmer *in re*, 3 B. R. 74; Scammon v. Cole, 3 B. R. 200; Butler *in re*, 4 B. R. 91; Kahley *in re*, 4 B. R. 124; Harvey v. Crane, 2 Biss. 496.

debtor's stock in trade, is to put an end to further credit to him and break up and terminate his business. The rational effect of thus incumbering his property is to give the secured creditor a fraudulent preference.[1] When given for a pre-existing debt, it is such an apparent preference as to make it almost impossible to explain it away.[2] Where a trader executes a mortgage on part or all of his property, the question under the bankrupt law is not whether putting the mortgage in force will put an end to his business, but whether it will make him insolvent. Thus, a manufacturer mortgaged all his machinery to secure certain bills drawn by him and accepted by the assignees of his goods which had been discounted by the mortgagee, and also such other bills as should from time to time be discounted in a like manner. The mortgagee was empowered to take possession and sell after giving three days' notice, and from the proceeds to pay the expenses and bills then due, and return the surplus to the mortgagor. At the time of the execution of the mortgage the machinery was worth $3,000, and the mortgaged property consisted of goods worth $6,000, and debts amounting to $4,500. It was held that the mortgage was no evidence of bankruptcy, although had it been acted upon, the mortgagor would not have carried on the particular business in which he was then engaged.[3] The court must judge of the mortgagor's standing at the time of the mortgage; if it appears that his condition was such that a mortgage must operate as a preference, it cannot be declared that there was no

[1] Graham v. Stark, 3 Ben. 520; Scammon v. Cole, 3 B. R. 393.

[2] Forbes v. Howe, 102, Mas. 427; Rison v. Knapp, 1 Dill, 186; Kingsbury *in re*, 3 B. R. 318.

[3] Young v. Wand, 14 Eng. Law & Eq. 462.

intention or view to give a preference because there was a possibility of the mortgagor's earning in the future enough to pay all his debts, and hoped to do so. It matters not what was his principal motive; if he was actually insolvent and knew it, he will not be allowed to pledge all his property, or any part of it, to one creditor, leaving the other creditors dependent, in whole or in part, upon his subsequent good fortune in business enterprise.[1] The purpose of the bankrupt act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that intends to defeat that purpose should be strictly construed against him, and courts should indulge every reasonable presumption that is permissible according to the well-settled rules of law to secure the full benefit of the cardinal principal of law. The bankrupt law should not be construed to prevent the exercise of a reasonable *bona fide* effort on the part of an energetic and hopeful debtor struggling with an honest intent to pay all his debts; but to allow every embarrassed debtor to go on and sustain his acts because he says he thought he could go through and hold as valid his payments and securities, would be to defeat altogether the objects and provisions of the bankrupt law.[2] As a mortgage of property, to be acquired after the date of its execution is not a valid mortgage, but merely an authority to take possession, the right of creditors under the bankrupt law must depend upon its effect upon the property at the time the act was done, which might be supposed to operate as a transfer. This is the taking possession under the license contained in the mortgage. It is not competent for a party

[1] Driggs v. Moore, 1 Abb. C. C. R. 440; Hyde v. Corrigan, 9 B. R. 466; Wager v. Hall, 3 Biss. 28.

[2] Wager v. Hall, 16 Wall, 584; Warner *in re*, 5 B. R. 414.

in relation to property which he may afterwards acquire and thus prefer a creditor who shall take possession when the mortgagor is known to be insolvent, and thus avoid the effect of the bankrupt law, because, literally, he has not made a transfer. That would be a facile method of evading the scope and spirit of the law. In legal effect, the transaction is a continuing act from the date of the mortgage to the taking of the possession, the last act being the consummation of the transfer. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagee takes possession.[1]

§ 111. **Mortgages that are void in Bankruptcy.** —If a bankrupt has procured one of his debtors to execute a mortgage and transfer property to a creditor, the transaction will be deemed a preference, although there is no express agreement that the indebtedness due to the bankrupt should constitute the consideration therefor.[2] A mortgage once paid cannot be revived by parol agreement or continued for a demand other than the one it was given to secure, for the purpose of giving a preference thereby. The policy and object of the bankrupt law are to seize and appropriate the property of the bankrupt for the benefit of his creditors. The debts are made a lien upon his property, and it must be disposed of for the purpose of satisfying them. To permit a bankrupt, after he knows that he is insolvent, to revive satisfied liens in order to pay part of his creditors, would be as fatal to the rights of his other creditors, as a palpable violation of the objects as well as the letter of the act, as if he were permitted to create

[1] Eldredge *in re*, 2 Biss. 362. [2] Smith v. Little, 9 B. R. 11.

new liens for the same purpose. The bankrupt law, as well as general principles, prohibit any such revival.[1] A mortgage which stipulates for the payment of all the debts of the mortgagor at the end of six months, and secures to the debtor the right, with the consent of the party selected by himself, to continue his business, including the purchase of more goods until a breach of condition of the mortgage sets creditors at defiance, and necessarily delays and defeats the operation of the bankrupt act. If a debtor can legally do this for six months, it is difficult to see how, on principle, he can be restrained from securing like immunity for six years by the same method.[2] So, where the consideration stated in a mortgage is four times the amount actually owed, such mortgage is *prima facie* fraudulent.[3] A mortgage was given by a party who was afterwards adjudged bankrupt. The assignee sold the mortgaged property and the mortgagee petitioned the court to be paid the proceeds in satisfaction of the mortgage. The mortgagee allowed the mortgagor to retain possession and make sales and apply the proceeds to his own use. The mortgage being void under the laws of the State where made, the mortgagee's petition was denied.[4] A mortgage given for the purpose and manifest design of so encumbering a debtor's available means that creditors will be hindered and delayed in the collection of their demands, is fraudulent and void.[5]

[1] Winslow v. Clark, 47 N. Y. 261.

[2] Chamberlain *in re*, 3 B. R. 173; Doyle *in re*, 3 B. R. 159.

[3] Dumont *in re*. 4 B. R. 4.

[4] Cantrell's case, 6 Ben. 482; Smith v. Ely, 10 B. R. 553.

[5] Cowles *in re*, 1 B. R. 42.

§ 112. **Mortgages that are not within the Rule as above stated.**—Mortgages of property in good faith are not necessarily preferences to particular creditors, nor can they be said to be evidence of insolvency. A mortgage cannot be an act of bankruptcy as made with an intent to hinder or delay creditors, when there is no proof or allegation that the debtor was insolvent at the time it was made or that the mortgagee knew that fact.[1] It is as much the policy of the bankrupt act to uphold liens and trusts when valid as it is to set them aside when invalid.[2] The preference at which the law is directed can only arise in the case of an antecedent debt. The giving of a security when the debt is created, is not within the law, if the transaction be free from fraud, in fact, the party who loans the money can retain the security until the debt is paid.[3] There is nothing in the bankrupt law which interdicts the loaning of money to a man who may be in an insolvent condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan is made in good faith, without any intentions to defeat the bankrupt law. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin

[1] Dunham *in re*, 2 Ben. 488; Cowles *in re*, 1 B. R. 42; Rogers *in re*, 2 B. R. 129.

[2] Potter v. Coggeshall, 4 B. R. 73; Wynne *in re*, 4 B. R. 23; Clark v. Iselin, 21 Wall. 361; Cook v Tullis, 18 Wall. 332.

[3] Tiffany v. Boatmen's, &c. Inst., 18 Wall. 376; Clark v. Iselin, 10 Blatch. 204; Bentley v. Wells, 61 Ill. 59; Morrison *in re*, 6 Chi. Leg. News, 110; Cook v. Tullis, 18 Wall. 332; Clark v. Iselin, 21 Wall. 361.

might be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every one is interested that his business should be preserved. In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the bankrupt act are violated if these collaterals be taken *at the time* the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which it is one of the great objects of the bankrupt law to prevent. The preference at which the law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever, for a debt already incurred, if the creditor had good reason to believe the debtor insolvent. But the giving of securities when the debt is contracted, is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England, this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securi-

ties at the time for their repayment.[1] So that the doctrines stated in the preceding sections, and although well settled, have been modified and the law settled in conformity with the later acts of congress, as well as natural justice. A creditor who makes a loan in good faith gets a good title.[2]

§ 113. **Valid Mortgages which are Protected by the Bankrupt Law.**—It will be seen that the principle upon which the Federal courts have rested their decisions is that of *preference*, and almost every kind of lien, whether by mortgage, judgment or assignment, was regarded as interfering with that great and paramount power, the United States Bankrupt Courts, until the law was made a system of oppression rather than relief. The decisions were uniform, and the power of the assignees in bankruptcy and United States Marshals were almost supreme. Judicial sales upon execution issued on judgments rendered, even before the passage and operation of the bankrupt law, were enjoined, and mortgages and other *bona fide* conveyances, by way of security, were declared fraudulent and void, as a preference, until the law became so intolerable and burthensome that its repeal was demanded. Congress, in obedience to the demands of the people, amended, and have continued amending the law until it has become, from a universal panacea to creditors, a remedy which but few are desirous of obtaining as beneficial to

[1] Tiffany v. Boatmen's, &c. Inst., 18 Wall. 388; Clark v. Iselin, 21 Wall. 360; Hutton v. Cruttwell, 1 Ell. & B. 15; Bittlestone v. Cooke, 6 Ell. & B. 296; Cooke v. Tullis, 18 Wall. 332; Harris v. Rickett, 4 H. & N. 1; Bell v. Simpson, 2 H. & N. 410; Lee v. Hart, 34 Eng. L. & Eq. 569; Hunt v. Mortimer, 10 B. & C. 44; Shouse *in re*, Crabbe, 482; Cowles *in re*, 1 B. R. 42; Wadsworth v. Tyler, 2 B. R. 101; Clark v. Iselin, 10 Blatch. 204; Bentley v. Wells, 61 Ill. 59; Morrison *in re*, 6 Chi. Leg. News, 110.

[2] Sedgwick v. Place, 10 B. R. 28.

them, so that there can be little doubt but what the law will fall into desuetude and become obsolete or repealed. Congress, in amending the bankrupt law, adopted, among other provisions, the following, section 5052 of the Revised Statutes: No mortgage of any vessel or of any other goods or chattels, made as security for any debt in good faith, and for a present consideration, and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected by an assignment in bankruptcy. This provision cannot enlarge the rights or title of the assignee, or make a mortgage invalid against him, which, but for the provision, would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding registration, so if the mortgage is one that requires no record, as if executed in a State having no statute upon the subject, or if record is not required between the parties, the provision will not defeat it.[1]

It would be going too far to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds or conveyances of analogous character. It leaves all instruments not expressly saved to the general principles of jurisprudence.[2] Mortgages which are not otherwise valid or duly recorded are not enumerated as protected in favor of the mortgagee, but are carefully excluded. The attention

[1] Griffiths *in re*, Low. Dec. 431; Potter v. Coggeshall, 4 B. R. 373; Dow *in re*, 6 B. R. 10.

[2] Wynne *in re*, 4 B. R. 23.

of congress was specially called to chattel mortgages, and the language of the act is carefully framed so as to recognize and protect such liens as were already valid by the laws of the land, the statutes of the United States, or of the State where the transaction occurred. The maxim *expressio unius est exclusio alterus* applies to other cases.[1] A mortgage valid against the mortgagor who is a bankrupt, is valid against his assignee; while it may not take effect as against creditors but from the date of record or delivery of possession, it will become operative against the mortgagor from its date. The recording of a mortgage is not the act of a mortgagor. It is at the date of the mortgage that all his interest in the property described in it becomes vested by way of security in the mortgagee. It is then that he delivers the instrument and parts with all control of it. If the mortgagee is satisfied with the security of an unrecorded mortgage, there is no necessity or obligation to record it. The object of recording it is to make it a valid security against other creditors; it is not for the mortgagor to determine whether it shall be recorded or not. The delivery for record is in no sense the act of the mortgagor but that of the mortgagee.

The law that makes mortgages void that are unrecorded, makes them valid from the time they are recorded.[2] If a State statute deprives a mortgage of effect until filed for record as to creditors, purchasers and mortgagees in good faith, it will be valid against the assignee if filed for record prior to the commencement of bankruptcy proceedings;[3] for the title of the

1 Edmonson v. Hyde, 7 B. R. 1; Morrill *in re*, 8 B. R. 117.

2 Seaver v. Spink, 8 B. R. 218; Craigin v. Carmichael, 2 Dill, 519; Wynne *in re*, 4 B. R. 23.

3 Gibson v. Warden, 14 Wall, 244.

assignee only relates to the filing of the petition.[1] An agreement by a mortgagee that he will not put his mortgage on record unless the mortgagor shall have trouble, does not as a matter of law avoid the mortgage as to creditors.[2] Such mortgages, if made more than three months before the date of the petition in bankruptcy, although recorded within two months thereof, are not avoided by sections 5128 and 5129 of the Revised Statutes of the United States and the amendments thereto. In Illinois a mortgagee who takes possession of the mortgaged property before any other person has acquired a lien or vested right therein, has a better title than the assignee, although the mortgage was not properly recorded.[3] Liens are, in general, enforced in courts of bankruptcy according to priority of date;[4] and only such liens as are valid by the laws of the State will be recognized,[5] and such liens must exist at the time of the commencement of bankruptcy proceedings.[6] The bankrupt law makes no distinction between liens whether by mortgage or otherwise; if they have been acquired *bona fide* and are recognized by the State law, they have the same priorities and dignity as though no proceeding in bankruptcy had taken place.[7] The uniform construction placed upon the bankrupt law by the Federal courts, is, that in order to make a contract between debtor and creditor fraudulent within the intent and purview of the act, both parties must participate in the fraud. The creditor must know of the pending insolvency of the debtor, and must be aware that he is obtaining a preference over other cred-

[1] Perrin *in re*, 7 B. R. 283.
[2] Folsom v. Clements, 111 Mass. 273.
[3] Burnett *in re*, 6 Chi. Leg. News, 36.
[4] Brock v. Terrell, 2 B. R. 643.
[5] Cozart *in re*, 3 B. R. 508.
[6] Day *in re*, 3 B. R. 305.
[7] Reed v. Bullington, 49 Miss. 223.

itors.[1] A mortgage cannot be avoided simply because it gave a preference to the mortgagee.[2] A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving him a preference, and in violation of the bankrupt act. The transfer of the equity of redemption is void. It is a clear rule of the common law, that a subsisting simple contract is not discharged or relinquished by the acceptance of another contract of the same nature given by the same party, and formed upon the same consideration, unless it be expressly so agreed. A contract originally valid remains so, and stands unaffected by any subsequent arrangement which is utterly void.[3] And where a person owing money, principal and interest for some time over due, but secured by mortgage, accounts with his creditor, and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and so open to attack under the bankrupt law if made within four months within a decree in bankruptcy against the debtor. If

1 Gillenwaters v. Miller, 49 Miss. 150.

2 Sidener v. Klier, 4 Biss. 391.

3 Avery v. Hackley, 20 Wall. 407; Burnhisel v. Firman, 22 Wall. 170; Ferrall v. Shawen, 1 Saund. 295; Rex v Allen Ray, 197; Queen v. Sewell, 7 Mod. 119; Gray v. Fowler, 1 H. Bl. 462, Fusil v Brookes, 2 C. & P. 314; Phillips v. Cockayne, 3 Camp, 119; Bush v. Livingston, 2 Caines Cas. 66; Swartout v. Payne, 19 John. 294; Hughes v. Wheeler, 8 Cow. 77; Merrills v. Law, 9 Cow. 65; Rice v. Welling, 5 Wend. 595; Hammond v. Hopping, 13 Wend. 505; Vilas v. Jones, 1 N. Y. 276; Johnson v. Johnson, 11 Mass. 359; Parker v. Cousins, 2 Gratt. 372; Troutman v. Barnett, 9 Ga. 30; Eastman v. Porter, 14 Wis. 39; Meshke v. Van Doren, 16 Wis. 319; Webster v. Stadden, 14 Wis. 277; Farmers, &c. Bank v. Joslyn, 37 N. Y. 353; Cook v. Barnes, 36 N. Y. 521.

the old security was not a preference, neither will the new one be so. They are to be considered as for the same debt.[1]

§ 114. **Rights of the Assignee in Bankruptcy. What Mortgages are void as to him.**—The assignee in bankruptcy stands in the place of the bankrupt; his rights are the assignee's rights, and are subordinate to all prior liens legal and equitable upon the property.[2] He also succeeds to the rights of the creditors as well as to those of the bankrupt. The assignee, as to parties claiming rights or liens against the estate, represents creditors, and any transaction which would be void for fraud as against creditors, if no petition had been filed, is void as against the assignee.[3] An unrecorded mortgage of personal property, which is not delivered to and retained by the mortgagee, is not valid against the assignee of the mortgagor.[4] Where the statutes of a State expressly declare that an instrument shall be void as to creditors until and except from the time it is filed for record, the title of the assignee will prevail against any claim under such instrument, if it remains unrecorded when the petition in bankruptcy was filed. It is not an unreasonable construction of the bankrupt act which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which at the time of the filing of the

[1] Burnhisel v. Firman, 22 Wall, 170.

[2] Gibson v. Warden, 14 Wall. 244; Lempriere v. Pasley, 2 T. R. 485; Belden v. Oldfield, 6 Bingh. N. C. 102; Doremus v. Walker, 8 Ala. 194; Peck v. Jenness, 7 How. 612: Fletcher v. Morey, 2 Story, 555.

[3] Boone v. Hall, 7 Bush. 66: Bradshaw v. Klein, 1 B. R. 146; Pratt v. Curtis, 6 B. R. 139; Metzger *in re*, 2 B. R. 114; Wynne *in re*, 4 B. R. 5; More v. Young, 4 Biss. 128.

[4] Bingham v. Jordan, 1 Allen, 373.

petition were valid only *inter partes* under the statutes of the States where they are claimed to exist.[1] In a State where a mortgage is void as to creditors, unless recorded, the assignee in bankruptcy takes title as against an unrecorded instrument.[2] The mortgagee cannot rely upon his possession taken under an unrecorded mortgage.[3] He may contest the validity of a conveyance even though the bankrupt could not. He may institute a suit to recover property or its value, which has been transferred in fraud of the bankrupt act.[4] In attacking a mortgage he has the same rights an attaching creditor would have and no more,[5] but he must show fraud within the intent of the bankrupt act before he can recover of a preferred creditor the value of the property transferred.[6] He is not entitled to any greater right of recovering back property under section 5021, than under section 5028.[7] But even after the mortgagor has conveyed away his equity or right of redemption prior to the commencement of bankruptcy proceedings against him, the assignee may maintain an action to have a mortgage set aside as a preference.[8]

It is held by some of the Federal judges that an unregistered mortgage, where possession is not delivered

1 Harvey v. Crane, 2 Biss. 406; Brock v Terrel, 2 B. R. 643, Allen v. Massey, 1 Dill. 40; Nat. Bank v. Hunt, 11 Wall. 391; Edmondson v. Hyde, 7 B. R. 1; Wynne *in re*, 4 B. R. 23; Perrin *in re*, 7 B. R. 283; Sabin *in re*, 12 B. R. 142.

2 Bank v. Hunt, 11 Wall. 391; Haney v. Crane, 2 Biss. 496; Moore v. Young, 4 Biss. 128; Brock v. Terrel, 2 B. R. 190; Allen v. Massey, 1 Dill. 40; Leland *in re*, 10 Blatch. 503; Wynne *in re*, 4 B. R. 5; Sabin *in re*, 12 B. R. 142; Doe v. Ball, 11 M. & W. 531.

3 Harvey v. Crane, 2 Biss. 496; Foster v. Hackley, 2 B. R. 131; Beam v. Amsink, 8 B. R. 228; Seaver v. Spink, 8 B. R. 268; Moore v. Young, 4 Biss. 128; Hussman *in re*, 2 B. R. 140; Manly *in re*, 3 B. R. 75; Morrill *in re*, 8 B. R. 117.

4 Foster v. Hackley, 2 B. R. 406; Bradshaw v. Klien, 2 Biss. 25; Metzger *in re*, 2 B. R. 355.

5 Craigin v. Carmichael, 2 Dill. 59.

6 Wadsworth v. Tyler, 2 B. R. 101.

7 Hubbard v. Allaire, 7 Blatch. 284.

8 Burfee v. Nat. Bank, 9 B. R. 314.

is good as against the assignee. The assignee in the absence of fraud represents the bankrupt, and takes only what the bankrupt had, subject to all incumbrances and liens which are valid as against him, and he is therefore fairly one of the parties within the statute. The assignee takes as a purchaser with notice of all equities.[1] If such a mortgage is void as to creditors under a State law, there can certainly be no reason why it should not be under the bankrupt law. Creditors certainly lose no rights by proceeding under the bankrupt law. The assignee does not represent the bankrupt exclusively. He is the agent appointed by the court to distribute the estate; he acts for and is elected by the creditors, the bankrupt having no voice in the matter. So that his estate does not pass as it would under an ordinary assignment made by himself where he has the choice of his own agent or trustee to distribute the property to his creditors. The reason given by the court in the cases cited in the preceding note, seem to be founded on more just and equitable principles than the cases last cited.

A mortgagee may take possession after proceedings in bankruptcy have been commenced,[2] but he cannot foreclose the mortgage under a power of sale contained therein in the mode and manner prescribed by State statute.[3] A foreclosure to which the assignee is not a party is of no effect as to him, and his equity of redemption remains in full force.[4] So that where a mortgagee

[1] Griffiths *in re*, Lowell, 431; Potter v. Coggeshall, 4 B. R. 73; Dow *in re*, 6 B. R. 10; Sawyer v. Turpin, 5 B. R. 9; Collins *in re*, 12 B. R. 379.

[2] Bentley v. Wells, 61 Ill. 59.

[3] Phelps v. Selleck, 8 B. R. 390; Whitman v. Butler, 8 B. R. 487;

[4] Winslow v. Clark, 47 N. Y. 261; Barron v. Newberry, 1 Biss. 149; Truitt v. Truitt, 38 Ind. 16 · Cole v. Duncan, 58 Ill. 176.

undertakes to enforce his lien against his debtor after the commencement of bankruptcy proceedings, he should, in order to foreclose the mortgagor's equity of redemption, make his assignee in bankruptcy a party, as by the bankruptcy proceedings it vests in him from the date of the filing of the petition by or against the bankrupt.

§ 115. **Provisions for Selling Incumbered Property.**—Section 5066 of the title bankruptcy in the Revised Statutes of the United States provides that the assignee shall have the authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, personal or real, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other incumbrance.[1]

The seventeenth rule of the Supreme Court of the United States further provides, whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage, or other pledge or lien, upon any property real or personal, or to relieve such property from any conditional contract, and to tender performance of the conditions thereof, the assignee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor in the office of the clerk of the District Court, and thereupon the court will appoint a suitable time and place for the hearing thereof, notice of which must be given in some newspaper, to be designated by the court, at least ten days before the hearing, so that all creditors and others

1 Dey *in re*, 3 Ben. 450; Stuart *in re*, 1 B. R. 42; Dwight v. Ames, 2 B. R. 47; Wynne, *in re*, 4 B. R. 5; Trim *in re*, 5 B. R. 23.

interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the assignee. Where a sale is made by an assignee without obtaining an order of court authorizing such sale, all that the assignee can convey is the interest of the mortgagor subject to the incumbrance,[1] but on application of the assignee the District Court may order the property which is incumbered to be sold free from incumbrances, the lien being transferred to the fund in court.[2] The lien of a mortgage follows the funds in the hands of the assignee, and binds it there in all respects, as it would before conversion of the property which the fund represents.[3] Where property subject to two mortgages is sold under an order of a bankruptcy court, and the proceeds are insufficient to pay the first mortgage in full, and all costs and expenses, the first mortgagee is entitled to be paid his debt in full, the same as he would be in case of a sale by foreclosure.[4]

§ 116. **Of the Rights of the Mortgagee where he proves his Debt with other Creditors.**—Section 5075 of the Revised Statutes of the United States provides, when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from

[1] King v. Bowman, 24 La. Ann. 506; Kelly v. Strange, 3 B. R. 8; McClellan *in re*, 1 B. R. 38; McVane *in re*, 3 B. 434.

[2] Foster v. Ames, Lowell Dec. 313; Sutherland v. Lake, &c. Co., 9 B. R. 298; Schuepff *in re*, 2 Ben. 72; Nat. Iron Co. *in re*, 8 B. R. 422; Rhodes *in re*, 19 Pitts L. J. 99; Salmans *in re*, 2 B. R. 56; Columbian Met. Works *in re*, 3 B. R. 75; McClellan *in re*, 1 B. R. 389; Winter *in re*, 1 B. R. 481; Stewart *in re*, 1 B. R. 278.

[3] Gibson v. Warden, 14 Wall. 250; Astor v. Miller, 2 Paige, 68; Sweet v. Jacocks, 6 Paige, 335.

[4] Bartenbach *in re*, 11 B. R. 61.

the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct, or the creditor may release or convey his claim to the assignee upon such property, and may be permitted to prove his whole debt.

If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.[1] The general purpose and policy of the bankrupt act is to produce equality among the creditors of insolvent debtors, with the exceptions provided for in the act, and to attain that end its provisions should, in cases of extreme doubt, be construed beneficially for the general unsecured creditor. The term *has*, is of broader signification than the term *holds*, although the holder of a promissory note, the endorser of which is secured by a mortgage upon property of the bankrupt, has no legal title nor any common-law right to mortgage, pledge or lien, upon the property of the bankrupt which can be directly enforced by him, under the strict and technical rules of the common law. Yet he has in equity, and potentially, a mort-

[1] Davis v. Carpenter, 2 B. R. 125; Bigelow *in re*, 2 Ben. 480; Wynn *in re*, 1 B. R. 131; Cram *in re*, 1 B. R. 32; Frizzelle *in re*, 5 B. R. 122; Stansel *in re*, 6 B. R. 183.

gage, pledge or lien, upon the property of the bankrupt for securing the payment of his debt within the meaning of this provision.[1] It is held by State courts that a mortgagee does not lose his rights by participating in bankruptcy proceedings, such as voting for an assignee, &c., nor does the sale made by the assignee divest the mortgagee of his right to pursue the property in the hands of the purchaser. In such a case the Bankrupt Court passes such title as the bankrupt himself could pass.[2]

[1] Jaycox *in re*, 8 B. R. 241

[2] King v. Bowman, 24 La. Ann. 506

his mortgage in the least; he may have as many kinds of security as he can obtain, but he can get but one satisfaction of his claim.[1]

§ 118. **Mortgages by one Partner, Validity and Effect of.**—Partners are mutual agents of each other in all things which respect a partnership business, and the act of one in such things is the act of an agent of all. The principles of law governing partners are in general the same as those governing any other species of agency. A partner may bind the firm by proceedings of which the other partners are ignorant.[2] A pledge or mortgage by one partner of partnership property will bind his co-partners, although it be made without their privity, provided the mortgagee had no notice that it was joint property, and there be no fraud in the transaction; for a pledge by a partner does not resemble a pledge by a factor, the latter has merely power, the partner has both power and property, and is to be considered as possessed of the entirety of the article pledged.[3] One partner may execute a valid mortgage of property owned by the firm.[4] As a mortgage of personal property need not be under seal, and as a mortgage of such property of a firm, made by one of the partners to secure a debt of the firm, is valid, the addition by him of a seal does not vitiate it.[5] And where a

Ayers v. Watson, 57 Penn. 360.

2 Chemung, &c. Bank v. Bradner, 44 N. Y. 680; Hunt v. Chapin, 6 Lans. 139.

3 Raba v. Ryland, 1 Gow. 132; Rothwell v Humphries, 1 Esp. 406; Bank of U. S. v. Binney, 5, Pet. 529; Fox v. Hanbury, Cowp. 445; Thicknesse v. Brownlow, 2 Cr. & J. 425; Tupper v. Haythorn, Gow. 135; Reid v Hollingshead, 4 B. & C. 687; Church v. Sparrow, 5 Wend. 223; Livingston v. Roosevelt, 4 Johns. 251.

4 Patch v. Wheatland, 8 Allen, 102; Howden *in re*, 2 Mont. D. & De G. 574; Woodward v. Cowing, 41 Me. 9; Fox v. Hanbury, Cowp. 445; Purviance v. Sutherland, 2 Ohio S. 478; Duboise's Appeal, 38 Penn. 231; Daniel v. Toney, 2 Met. 523; Human v. Cuniffe, 32 Mo. 316; Sweetzer v. Mead, 5 Mich. 157.

5 Milton v. Mosher, 7 Met. 244.

mortgage was made by a firm, one of whom signed the affidavit, prescribed by statute, as to the *bona fides* of the transaction, by the name by which the firm is known and designated, it was well signed by that member.[1] One of several partners cannot make a contract, that a note and mortgage made by another member of the partnership on his individual property, to secure a partnership debt, shall stand as security for future advances made by the mortgagee to the partnership after the mortgage debt has been paid by the firm; on the contrary, the party making the note and mortgage is entitled to have the same given up and satisfied of record.[2] And if a partner mortgage his interest in the partnership property, the other partner cannot apply it in discharge of the firm debts.[3]

§ 119. **Mortgages of Crops.**—Growing crops, as wheat and corn, cotton, potatoes, the annual produce of labor and cultivation of the earth, being personal chattels, may be the subject of a chattel mortgage. The owner or lessee of land may give a valid mortgage on his crop before it is raised. An instrument purporting to mortgage a crop, the seed for which has not been sown, cannot at the time operate as a mortgage; but after the seed has been sown, and the crop is grown, the mortgage lien attaches.[4] A growing crop has such an existence as to be the subject matter of a mortgage, so as to vest in possession immediately or at a future time.[5] But where the crop is just planted, and not yet

[1] Randal v. Baker, 20 N. H. 335.

[2] Beardsley v. Tuttle, 11 Wis. 74.

[3] Mosely v. Garrett, 1 J. J. M. 212.

[4] Butt v. Ellett, 19 Wall. 544; Ellett v. Butt, 1 Wood C. C. 214; Robinson v. Ezzel, 72 N. C. 231; Cook v. Steel, 42 Tex. 53.

[5] Adams v. Tanner, 5 Ala. 740: Westbrook v. Eager, 16 N. J. L. 81.

up, the mortgage is void, as property that is not in existence; property not capable of being identified at the time of its execution, cannot be mortgaged so as to give any valid lien thereon.[1] Thus, under a mortgage "of all the hay and grain of every kind that grows on the farm on which I now live the present year," it was held that the hay and rye of the preceding year, or that which was *in esse*, could be held as against creditors, but no part that was not in existence at the time of its execution could be held under the mortgage.[2] A tenant who executes a mortgage upon his crop to secure an indebtedness for supplies furnished to him to raise such crop, which mortgage is duly recorded, creates a lien in favor of such mortgagee which is superior to that of his landlord for the rent of the ground upon which the crop is raised.[3] Where ten acres of growing wheat were mortgaged, and the mortgage duly recorded, and afterwards the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed and sold the wheat, and the purchaser converted it to his own use by mixing it with other wheat, such purchaser is liable to the mortgagee for the value of the wheat.[4]

§ 120. **Mortgages Providing for the Payment or Allowance of a Certain Amount for Costs, Expenses and Attorney's Fees.**—Mortgages of real and personal property have not only been regarded

1 Milliman v. Neher, 20 Barb. 37; Hutchinson v. Ford, 9 Bush. 318; Comstock v. Scales, 7 Wis. 159; Cudworth v. Scott, 41 N. H. 456; Chenoweth v. Tenney, 10 Wis. 397; F. L. & T. Co. v. Com. Bank, 11 Wis. 207; Single v. Phelps, 20 Wis. 398; Mowry v. White, 21 Wis. 417; Bank, &c. v. Crary, 1 Barb. 452; Otis v. Sill, 8 Barb. 102.

2 Cudworth v. Scott, 41 N. H. 456.

3 Stamps v. Gilman, 43 Miss. 456; Jones v. Chamberlain, 5 Heisk, 210.

4 Duke v. Strickland, 43 Ind. 494.

as security for the debt and interest, but also for costs and expenses of foreclosure and obtaining possession. The lien of a mortgagee attaches equally for the debt and for the costs necessarily incurred in the enforcement of his rights.[1] And it is not only just and reasonable, but it is perfectly proper that a mortgagor who borrows money for his own use and benefit should bear the expense of collecting that money from him. And a stipulation in a mortgage that the mortgagee shall be allowed a percentage on the amount of the debt for the expenses of collection is valid, and will be sustained by courts and enforced in all cases where it is part of the contract.[2] The agreement may be for the allowance of a reasonable amount of counsel fees in case the mortgagee is put to any expense, or for five or ten per cent. upon recovery, such an agreement is not void for usury, but is valid and binding.[3] Thus, where the plaintiffs gave a bond to one A. for the benefit of the defendant, and the latter gave the plaintiffs a mortgage conditioned to save them harmless, and indemnify them

[1] Hurd v. Coleman, 42 Me. 182; Carrier v. Minturn, 5 Cal. 435; Goubier v. Minturn, 5 Cal. 497.

[2] Jones v. Grover, 46 Ga. 568; Hitchcock v. Merritt, 15 Wis. 522; Mans v. McKillip, 38 Md. 231; Pierce v. Kneeland, 16 Wis. 672; Cox v. Smith, 1 Nev. 161; Robinson v. Loomis, 51 Penn. 78; McLane v. Abrams, 2 Nev. 199; Bronson v. La Crosse R. R., 2 Wall. 283; Rice v. Cribb, 12 Wis. 179; Mosher v. Chapin, 12 Wis. 452; Huling v. Drexel, 7 Watts, 126; Boyd v. Summer, 10 Wis. 41; Pomeroy v. Ainsworth, 22 Barb. 119; Carrier v. Minturn, 5 Cal. 435; Simon v. Hairfleigh, 21 La. 607; Rawson v. Hall, 56 Mo. 142; Nelson v. Everett, 29 Iowa, 184; Williams v. Meeker, 29 Iowa, 292; Clawson v. Munson, 55 Ill. 394; Sharp v. Barker, 11 Kans. 381; Tholen v. Duffy, 7 Kans. 405; Cutter v. Howe, 8 Mass. 257; Bank v. Allen, 10 Mass. 284; Schuck v Wright, 1 G. Green, 128; Gambrill v Doe, 8 Black, 140; Bank v. Curtis, 19 Johns. 326; Fisher v. Otis, 3 Chand. (Wis.) 83; Pollard v. Baylois, 6 Mumf. 433; Billingsly v. Dean, 11 Ind. 331; Jones v. Schulmeyer, 39 Ind. 119.

[3] Boyd v. Sumner, 10 Wis. 41; Rice v. Cribb, 12 Wis. 179; Mosher v. Chapin, 12 Wis. 452; Huling v. Drexel, 7 Watts, 126.

from all costs, trouble and expense, which they might be put to in consequence of having signed the bond to A. in which mortgage a horse, with other property, was included, the plaintiffs were by suit compelled to pay a sum of money to A. and were forced to incur trouble and expense in order to get possession of the horse: held, that by virtue of the condition of the mortgage they were entitled to recover compensation for the trouble and expense incurred.[1] There are many cases where it would be an injustice to tax attorney's fees, and such cases must be governed by the application of equitable principles. But where a mortgage is made, and after default the mortgagor refuses to pay or allow the property to be sold for the purpose of satisfying the debt or refuses to sell it himself for that purpose, and the mortgagee is compelled to bring an action for the recovery of possession, to foreclose or to recover his money, it is reasonable and just that all the expenses attached to such proceedings should be included in the amount due on the mortgage. But the mere commencement of proceedings will not entitle a mortgagee to collect his attorney's fees. It is the final judgment or decree which the parties refer to as the act of foreclosure. If the mortgagor, after the commencement of proceedings against him, tenders the mortgagee the amount due on the mortgage, and all costs accrued up to the time of tender, he is discharged from further liability.[2]

§ 121. **Validity as Dependent on Registration.** —The validity of a chattel mortgage, as we have already shown, is as to creditors and others made

[1] Robinson v. Hill, 15 N. H. 477. [2] Schmidt v. Potter, 35 Iowa, 426.

dependent upon a compliance with the statutes of the State where the instrument is executed. The validity being dependent upon registration, the registration determines the rights of the mortgagee in regard to the priority of his lien. When a mortgagee of property which is in possession of another neither files his mortgage as required by statute, nor takes any steps to assert or make known his interest in the property, third persons contracting with the mortgagor without notice of the mortgage, are not liable to the mortgagee, nor do they take the property subject to the mortgage, and any contract in regard to such property made by third parties gives them precedence of the mortgage.[1] No lien arises unless the mortgage is properly recorded,[2] and the statutory requirements literally complied with,[3] and gives a mortgagee no priority over any other creditor unless filed as required.[4] A mortgagee who, in pursuance of an agreement with the mortgagor, has omitted to file his mortgage in order to preserve a false credit upon subsequent creditors and mortgagees, contrary to the spirit and provisions of law relating to such mortgages, is not merely negligent, but it is in bad faith, and can claim nothing under his mortgage against a subsequent mortgagee who has actually advanced money on the strength of the mortgage, even although he has by mistake, and without fraudulent intent, recorded his mortgage in the wrong county.[5] A mortgage where the goods are not delivered to the mortgagee, if not recorded in the county where the mortgagor resides, is

[1] Sheldon v. Warner, 26 Mich. 403; Ryan v. Clayton, 3 Strobh. 411.

[2] Weed v. Standley, 12 Fla. 166; Hibbard v. Bouvier, 1 Grant Cas. 266.

[3] Powers v. Freeman, 2 Lans. 127.

[4] Henderson v. McGhee, 6 Heisk. 55.

[5] De Courcey v. Little, 4 Green (N. J.), 115; De Courcey v. Collins, 21 N. J. Eq. 357.

absolutely void as to all persons other than the parties thereto, whether such persons have or have not acquired a lien upon the property.[1] And if after such time the mortgagee takes possession of the property in consequence of a violation of a stipulation in the mortgage entitling him to such possession upon any attempt to defraud him by the mortgagor, and not in consequence of the maturing of the debt secured thereby, and a failure to pay it, he has no legal or valid claim to it as against the creditors of the mortgagor. In some of the States the law makes all unrecorded mortgages void only as to purchasers and others without notice. So that the question of notice is important in those States where this statutory provision exists. As to what is notice and what mortgages are notice to disinterested parties, we will examine in a subsequent section.

§ 122. **Priority as Affected by Registration.**— Registration being regarded as notice to all the world, parties contracting or transacting business with a person, are expected to examine the records, and if there are any incumbrances which are recorded, the law presumes that their transactions were based upon notice of such incumbrance. So that whether a party examines the records or not, he has notice of every instrument affecting the property of the person with whom he is dealing. It is this record which gives one man priority over another, and if A. obtains a mortgage from B., which he fails to have recorded, and C. also obtains one

1 Sidener v. Bible, 43 Ind. 330; Leland *in re*, 10 Blatch. 503; Jacoway v. Gault, 20 Ark. 190; Stephens v. Barnett, 7 Dana, 257; Stephenson v. Browning, 48 Ill. 78; Gaff v. Harding, 48 Ill. 148; Huling v. Guthrie, 4 Penn. 123; De Courcey v. Collins, 21 N. J. Eq. 357; Pond v. Skidmore, 40 Conn. 213; Lockwood v. Slevin, 26 Ind. 124.

which he has recorded, C. is presumed to have taken his without notice of A.'s rights, and he is therefore accorded a priority and preference over A. The priority of two independent mortgages is determined by the dates of their registry.[1] And this, although the subsequent mortgagee have notice of the prior unrecorded one[2] (except where the statute otherwise provides), and is therefore absolutely void as to such subsequent mortgagee.[3] A party claiming priority under and by virtue of a statute regulating the registry of mortgages, must show a compliance with such provisions in order to entitle him to such priority.[4] The fact that two mortgages are executed by the same mortgagor, and were recorded at the same time, does not preclude the operation of facts and circumstances showing that one of them is entitled to priority.[5] Parol evidence is admissible to prove that they were or were not to be equal liens.[6] And where they are so connected with each other that they may be regarded as one transaction, they will be held to take effect in such order of priority and succession as shall best carry out the intention and secure the rights of all parties.[7] And it becomes a matter of fact for the jury to determine which of the number is to have priority, by showing the delivery of the one intended by the parties first to take effect.[8] And a court, in order to ascertain which one of

[1] Peychaud v. Citizens' Bank, 21 La. 262; Harang v. Plattsmier, 21 La. 426; Copeland v. Bennett, 10 Yerg. 355; Taylor v. Thomas, 1 Halst. Ch. 331; Clabaugh v. Byerly, 7 Gill. 354; Rigley v. Harris, 3 Biss. 199; Pomet v. Scranton, 1 Miss. 406; Grant v. Bissett, 1 Caines Cas. 112.

[2] Stansel v. Roberts, 13 Ohio, 148; Mayham v. Coombs, 14 Ohio, 408; Fleming v. Burgin, 2 Ired. Eq. 584.

[3] De Courcey v. Collins, 21 N. J. Eq. 357.

[4] Thompson v. Mack, Harr. Ch. 150.

[5] Stafford v. Van Rensselaer, 9 Cow. 316

[6] Isett v. Lucas, 17 Iowa, 503.

[7] Pomeroy v. Latting, 15 Gray, 435.

[8] Gilman v. Moody, 43 N. H. 239.

several mortgages registered on the same day takes preference, will inquire into the fractional parts of the day.[1] Where the mortgages executed at the same time are made to secure the payment of notes maturing at different times, that is the prior lien which secures payment of the note first falling due.[2]

When neither of two mortgages, from the manner in which they were executed, creates anything but an equity to the property mortgaged, the eldest equity must prevail;[3] where there is no preference intended, and two mortgages are executed on the same day, they will share *pro rata* in the proceeds of the sale of the property.[4] A parol agreement made upon the delivery of two mortgages, as security for a debt, that one of the mortgages shall have priority over the other, and a recording of one five minutes before the other, in pursuance of such agreement, does not give it priority, as between two parties, without notice, to whom they are respectively assigned.[5] Where there are two mortgagees of the same property under different mortgages, both of which provide for the possession to remain with the mortgagor, but both void as to creditors and purchasers, if the junior mortgagee first obtains possession he will hold the property as against the prior mortgagee, although he had notice of the prior mortgage.[6] Where a mortgage for a part of the purchase money is given to the vendor of personal property on the day of the sale, or soon after, it is part of that transaction, and takes precedence of a mortgage of the same property given by the vendee before the sale to a *bona fide* mortgagee for a valuable consid-

1 Lemon v. Staats, 1 Cow. 592.
2 Isett v. Lucas, 17 Iowa, 503.
3 Growning v. Behm, 10 B. Mon. 383.
4 Russell v. Carr, 38 Ga. 459.
5 Lane v. Davis, 14 Allen, 225.
6 Frank v. Miner, 50 Ill. 414.

eration, and recorded immediately.[1] In those States where there are no statutory provisions requiring the registration of a mortgage within a certain specified time, a chattel mortgage, filed prior to the execution of any subsequent mortgage, or before any other rights accrue, will have the priority of lien, and courts cannot declare a mortgage void because it was not filed at the time of its execution.[2] The record of a mortgage is the act of the mortgagee, and if he is willing to take a mortgage and keep it without recording it, he must take the consequences of his acts. Thus, where a lease stipulating that none of the personal property of the lessees should be removed from the premises while any of the rent remained unpaid was not filed as required by the act relating to chattel mortgages, it confers an inferior lien to that of a subsequent *bona fide* mortgagee without notice of the same chattels to secure a note payable one day after date.[3] But a subsequent mortgagee cannot overreach a prior mortgage of which he had notice because it was recorded upon an insufficient authentication.[4] If a mortgage be made expressly subject to a former mortgage, it is subject to it, though the former be so defective as to amount to a mere executory contract, or equitable lien.[5] If a mortgagee request a mortgagor to file the mortgage for record, and the latter, for some reason of his own, requests the recorder to place it where it cannot be seen, such action is beyond the scope of his authority, and the mortgagee's priority will not be prejudiced thereby.[6]

[1] Walker v. Vaughn, 33 Conn. 577.

[2] Hicks v. Williams, 17 Barb. 523.

[3] Smith v. Worman, 16 Ohio S. 145.

[4] Underwood v. Ogden, 6 B. Mon. 606.

[5] Coe v. Col. &c. R. R., 10 Ohio S. 372.

[6] Case v. Jewett, 13 Wis. 498.

§ 123. **Priorities in case of Mechanics, for Liens.**—Where the owner of a mortgaged chattel places it in the hands of a mechanic for repairs which are necessary to put it in condition for use, and the mechanic retains possession until his charges are paid, his lien is prior to, and can be enforced against the mortgage, if the mortgage becomes due before the repairs are made, and possession retained by the mechanic, where the mortgagee has never taken possession under his mortgage.[1] The verbal promise of the mortgagee to pay for the repairs made upon the mortgaged property for the mortgagor, provided the mechanic will relinquish his lien on the property, is valid, and may be enforced against the mortgagee.[2] But where A. manufactures a buggy for B., furnishing the material therefor, except the top which is furnished by B., and B. has paid the price agreed on, under these circumstances, and while the buggy is in A.'s possession, he mortgages it to C., a creditor, without notice of B.'s rights, the rights of C., the mortgagee, are unaffected thereby, inasmuch as bare knowledge on the part of C. that the buggy was made for B. will not charge him with notice of B.'s rights.[3]

§ 124. **Temporary Withdrawal of a Mortgage from the Record.**—A mortgage of personal property takes effect as to third persons from the time it is filed for record. In Tennessee it takes effect from the date of its acknowledgement.[4] After it is placed on file, it cannot be properly allowed by the recorder to be taken away by the mortgagee; it is a public record belonging

[1] Scott v. Delahunt, 5 Lans. 372.
[2] Gouradt v. Sullivan, 45 Ind. 180.
[3] Hesser v. Wilson, 36 Iowa, 152.
[4] Grady v. Sharron, 6 Yerg. 320.

to the office.[1] But in case of a temporary withdrawal of the paper from the recorder's office, the mortgagee will not be prejudiced by a levy made at the instance of another creditor.[2] Where it is withdrawn by mistake, but is with due diligence re-filed, the lien remains as against one who, with knowledge of the facts, attaches the property while the mortgage is absent from the files.[3]

§ 125. **Purchase Money Mortgages,—Validity of.**—Where a party makes a sale of personal property and takes a mortgage from the purchaser to secure the purchase money, it constitutes in law one transaction, and the mortgage cannot be avoided unless the sale is rescinded.[4] And where the purchase is made by an infant, and he becomes the mortgagor, he cannot on the ground of infancy avoid the mortgage without also avoiding the purchase,[5] and where such mortgage is properly filed, the purchaser of such property from the infant takes it subject to the mortgage.

§ 126. **Who Cannot Contest the Validity of a Mortgage.**—As between the parties, no evidence is admissible to contradict or vary it, while as to creditors, evidence is admissible to prove a mistake,[6] as where the note is made payable on demand, or dated a year prior, to prove that the debt is not due, so the declarations of a mortgagor as to his intention in executing the mortgage are not admissible in evidence to impeach the title of the mortgagee by showing fraud, unless they

[1] Woodruff v. Phillips, 10 Mich. 500.
[2] Wilson v. Leslie, 20 Ohio, 161.
[3] Swift v. Hall, 23 Wis. 532.
[4] Heath v. West, 28 N. H. 101.
[5] Curtiss v. McDougal, 26 Ohio S.66.
[6] Fuller v. Acker, 1 Hill, 413; Thompson v. Ketcham, 8 John. 189; Hogg v. Smith, 1 Taunt. 347.

were brought to the knowledge of the mortgagee prior to the execution of the mortgage.[1] A mortgage by a vendor who remains in possession is good, if the mortgagee takes it in good faith, without notice of the sale. And the declarations of the mortgagor in the absence of the mortgagee are not admissible to prove notice of the sale.[2] A mortgagor is estopped from saying that no title passed by the mortgage, nor allege anything in opposition to a claim founded thereon.[3] One who was neither a judgment creditor nor a general creditor of the mortgagor at the time he gave a mortgage to secure an existing debt, and for future advances, appearing on its face to be for money due only, cannot subsequently object to its validity.[4] Only creditors and the mortgagor, and subsequent purchasers in good faith, can assail a mortgage under which the mortgagor retains possession. As to such parties, if the mortgage be not recorded, and there is no change of possession, it is to be considered as absolutely void; if it is recorded, the presumption is only *prima facie* that it is void, and evidence may be received, and must be given, to rebut it, in order to sustain the mortgage.[5] A fraudulent mortgagor cannot compel a *bona fide* purchaser from himself to contest the validity of a prior mortgage on the ground that the mortgagor retained possession of that property. The right is personal to the purchaser and not available to the mortgagor.[6]

[1] Prior v. White, 12 Ill. 261; Donaldson v. Johnson, 2 Chand. 160.

[2] Dalmer v. Williams, 29 Geo. 743.

[3] Den v. Vanness, 5 Halst. 102; Reed v. Shepley, 6 Vt. 602; Bailey v. Lincoln Academy, 12 Mo. 174; Holmes v. Hall, 3 Dev. 98; Palmer v. Mead, 7 Conn. 149; Herman on Estoppel, chap. xiv.

[4] Wescott v. Gunn, 4 Duer, 107.

[5] Pyle v. Warren, 2 Neb. 241.

[6] Rust v. Morse, 2 Hill 655.

# CHAPTER XIII.

## MORTGAGES OF SHIPS.

OF MORTGAGES IN THE FORM OF AN ABSOLUTE SALE.—REGISTRATION OF MORTGAGES.—STATUTORY PROVISIONS.—CONFLICT BETWEEN STATE AND FEDERAL COURTS IN REGARD TO REGISTRATION.—MORTGAGES OF STEAMBOATS.—CANAL-BOATS, ETC.—RIGHTS OF MORTGAGEES.—LIABILITIES, ETC.—RIGHTS OF OTHER PARTIES.

§ 127. Ships may be made the subject of securities, either by an ordinary mortgage effected by the owners for the repayment of moneys due from them, or by the master, as the owner's agent, to secure the repayment of advances made under certain circumstances for the use of the ship. Securities by the owners of ships have long been regulated by statute, both in foreign countries and in the United States. The statutory regulations in regard to mortgages by ships or vessels are of the same nature and effect as those relating to chattel mortgages, for the protection of creditors, purchasers and others, except parties to the transaction. As the greatest proportion of the litigation in regard to securities of this kind arises between the mortgagees and creditors, and as their rights are dependent upon a strict compliance with the statutory regulations, it will be necessary to ascertain what they are. Ships or vessels of the United States are the creations of the legislations of congress. There can be none denominated as such, or which are entitled to the benefits or privileges thereof, except those enrolled according to the acts of congress, and they must be wholly owned by a citizen or citizens of the United States, and commanded by a citizen of the

same. The acts of congress provide what vessels may become United States vessels, and entitled to carry the American flag, and entitled to the protection of the government. Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution of the United States to regulate commerce, its power to legislate for the security and protection of the rights and titles of all persons dealing therein cannot be doubted. The portions of the acts of congress which govern securities of this kind are as follows: "No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. The lien by bottomry, on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not however lose its priority, or be in any way affected by the provisions of this section.[1] The collector of customs shall record all such bills of sale, mortgages, hypothecations or conveyances, and also, all certificates for discharging and canceling any such conveyances, in books to be kept for that purpose, in the order of their reception; and shall certify on the bill of sale, mortgage, or hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded, and shall receive for so recording such instrument of conveyance or certificate of discharge, fifty cents; but no bill of sale, mortgage, hypothecation,

[1] Sec. 4192, Revised Statutes of U.S.

conveyance, or discharge of a mortgage, or other incumbrance of any vessel, shall be recorded unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgements of deeds.[1] The collector of customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the purchaser or mortgagee, and shall permit such index and books of record to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrollment, and also the material facts of any existing bill of sale, mortgage, hypothecation or other incumbrance upon such vessel, recorded since issuing the last register or enrollment, viz., the date, amount of such incumbrance, and from and to whom, or in whose favor made. The collector shall receive for each such certificate one dollar.[2] The collector of customs shall furnish certified copies of such records on the receipt of fifty cents for each bill of sale, mortgage or other conveyance.[3] A record of a mortgage made and certified by a subordinate officer in the custom-house is valid.[4] All bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling and the part conveyed to each person purchasing.[5]

§ 128. Notwithstanding the exclusive power given by the Constitution of the United States to congress to regulate commerce, and in opposition to the well-

[1] Sec. 4193, U. S. Revised Statutes.
[2] Sec. 4194, U. S. Revised Statutes.
[3] Sec. 4195, U. S. Revised Statutes.
[4] Esson v. Tarbell, 9 Cush. 407.
[5] Sec. 4196, Revised Statutes of U. S.

managing owner of said ship or vessel usually resides. "The name of the said ship or vessel, and the port to which she belongs must be painted on her stern, on a black ground, in white letters of not less than three inches in length." "There can be no doubt but what the system of recording such instruments in the collector's office at the home port of the vessel furnishes a much readier opportunity to persons dealing in this species of property to obtain a knowledge of the condition of the title than by a registration under a State law. But in case a new home port is acquired by change of ownership, a new enrollment or registry is required; the name of such port is substituted on the stern of the vessel. In case of a sale of a vessel, which can only be to citizens of the United States, a new and permanent registry becomes necessary; the former certificate of registry is surrendered to be canceled and a new one issued, which is recorded in the collector's office in which the *new permanent* registry is made, and it affords imformation to any person examining it as to the former home port, and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage or other incumbrance upon or against the vessel." It will be seen, as the law now stands, there can be very little difficulty on the part of purchaser or mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidence of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refers to the preceding one; the last bill of sale, incorporating into it a copy of the previous certificate of registry. In this respect the system of recording in the collector's

office possesses very great advantages over the filing of these instruments in the clerk's offices where the mortgagor happened to reside at the time, as no means exist under this practice by which a subsequent purchaser or mortgagee, by any dilligence, could obtain a knowledge of the actual condition of the title."[1]

§ 130. **Of the Form.**—The laws of the United States provide that every instrument in the nature of a bill of sale or other conveyance, or incumbrance of any ship or vessel, shall be duly acknowledged before a notary public or other officer authorized to take acknowledgments. This provision is the only one affecting the form; no matter how it may be drawn, it must be acknowledged like a conveyance of real estate, and as chattel mortgages must be in several States of the Union. A mortgage of a vessel may be by an absolute bill of sale, and it may be shown by parol evidence that, though absolute in its terms, it is only a mortgage.[2] The fact that the bill of sale is recorded; that the vessel is re-enrolled in the name of the transferee; that a policy of insurance is taken out in his name as owner, and that no note or bond is taken, will not overcome positive evidence that the bill of sale was taken as mere security for a loan.[3] A bond bad as a bottomry bond may be good as a mortgage of a vessel, but in order to render it effectual as a mortgage, the requirements of

[1] White's Bank v. Smith, 7 Wall.

[2] Morgan v. Shinn, 15 Wall. 105; Cases cited in chapter 2, *ante;* Henderson v. Mayhew, 2 Gill. 393; Welsh v. Usher, 2 Hill, ch. 167; Langton v. Horton, 5 Beav. 19; Babcock v. Wyman, 19 How. 289.

[3] Hoyer v. Savington, 1 P. Wms. 268; Russell v. Southard, 12 How. 139; Morgan v. Shinn, 15 Wall. 105.

the State laws must be complied with, which are applicable to chattel mortgages.[1]

**§ 131. Possession and Liability of Mortgagor and Mortgagee before Delivery of Possession.**— A mortgage of a ship, like an ordinary chattel mortgage, is good between the parties to the instrument without being registered,[2] and is good without actual delivery of possession or change of possession.[3] The doctrine that retention of possession by a mortgagor is fraudulent, is becoming obsolete. Mortgages containing either an express or implied permission for the mortgagor to retain possession until the occurrence of some breach, are in constant use, and courts are gradually applying the rules governing mortgages of real estate to chattel mortgages, and possession of the property, where a mortgage is registered, is regarded as proper, except in two or three States where chattel mortgages are not in use In regard to ships, the validity of mortgages as against creditors and others does not, as in the various States depend upon one of two things: actual change of possession or registry. The Statutes of the United States make no mention of possession. Registration is all that is required, and this registration is such that possession cannot deceive or mislead anyone in regard to the title or any incumbrance. Thus, a bill of sale of a ship and cargo lying in port, is as against creditors good and valid, if *bona fide* made, although possession

1 Greely v. Waterhouse, 19 Me. 9; Greely v. Smith, 3 W. & M. 236.

2 Lister v. Payn, 11 Sim. 348; cases cited *ante*, chap. vii.

3 Addis v. Baker, 1 Anst. 222; Russell v Butterfield, 19 Wend. 514; Call v. Gray, 37 N. H. 428; Leland v. The Medora, 2 W. & M. 92; Merrick v. Avery, 11 Ark. 370; D. Wolf v. Harris, 4 Mason, 515; Foster v. Perkins, 42 Me. 168; Haskell v. Greely, 3 Me. 425; Johnson v. Jeffries, 30 Mo. 423; McCalla v. Bullock, 2 Bibb. 288; Morrow v. Gurney, 35 Ala. 131.

of the same is not taken by the purchaser, if such bill of sale be merely by way of mortgage or security and not absolute, and it is pursuant to the agreement of the parties, that the mortgagor shall have the conduct and management of the voyage on which the ship is then destined.[1] Many mortgages of ships were made by an absolute bill of sale, and serious questions arose in regard to the liability of the purchaser, or rather mortgagee, as to his liability for supplies and repairs. Such mortgagee, under an absolute conveyance, was regarded as the legal owner of the interest conveyed, and while entitled to the possession and earnings of the vessel, was deemed responsible for the necessary repairs and expenses. This doctrine, after much discussion, was modified, and resulted in the establishment of the rule that the mere legal ownership does not make a party liable, without some evidence of his possession also, or of his actual agency. This principle has been repeatedly recognized and well settled in regard to the rights and liabilities of mortgagees of ships. The mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actively interferes in the employment of the vessel.[2] And whether the mortgage be by bill of sale, or absolute in its terms, or in the ordinary form, and the vessel be registered in his name,[3] and the fact that such bill of sale

[1] D. Wolf. v. Harris, 4 Mason, 515; Leland v. The Medora, 2 W. & M. 92;

[2] Chinnery v. Blackburn, 1 H. Bl. 177; Jackson v. Vernon, 1 H. Bl. 114; Briggs v. Wilkinson, 7 B. & C. 30; Westerdell v. Dale, 7 T. R. 306; Leonard v. Huntington, 15 John. 298; Ring v. Franklin, 2 Hall, 1; Brooks v. Bondsey, 17 Pick. 441; Colson v. Bonsey, 6 Me. 474; Duff v. Bayard, 4 W. & S. 240; Thompson v. Snow, 4 Me. 264; Winsor v. Cutts, 7 Me. 261; McIntyre v. Scott, 8 John. 159; Birkbeck v. Tucker, 2 Hall, 121; Lord v. Ferguson, 9 N. H. 380; Young v. Brander, 8 East. 10; Cordray v. Mordecai, 2 Rich. 518; Milton v. Mosher, 7 Met. 248; Phillips v. Ledley, 1 Wash. 226.

[3] Weber v. Sampson, 6 Duer. 358; Howard v. Odell, 1 Allen, 85; Morgan v. Shinn, 15 Wall. 105.

was intended only as collateral security, may be shown for the purpose of negativing any authority to procure supplies or repairs on the credit of its holder.[1] The mortgagee, out of possession, is under no obligation to contribute for repairs which he did not order. The ship's agents are not his agents, and they act under no authority from him. In order to charge him, the master, in ordering supplies or repairs, must be acting as his agent.[2] The mortgagee, if he is sought to be charged in such a case, may give in evidence his private transactions or course of business in reference to the vessel, in order to show that his connection with her was not that of an agent or consignee, and that it was not under his control or navigated for his benefit. The result of these cases has been the establishment of the principle which is now well settled in regard to the rights and liabilities of a mortgagee. A mortgagee does not, before he comes into possession, become liable for wages, repairs or supplies.[3]

Mortgagees are not the legal owners of the property mortgaged; they have a valid claim or title to the property in law or equity, which will subject it to the satisfaction of such claim. But the owner who is responsible for the supplies, repairs and wages, is the person who, having some kind of claim or title, has the control and management of the vessel, and has the right to receive her freight and earnings. And the ground of this liability seems to be the common maxim: *qui sentit commodum sentire debet et onus*, it being obviously right and just that he who enjoys the benefits of the vessel and controls her operations, who receives her

1 Blanchard v. Fearing, 4 Allen, 118; Howard v. Odell, 1 Allen, 85; Morgan v. Shinn, 15 Wall. 105; Jones v. Blum, 2 Rich. 475.

2 The Trobadour L. R. Adm. & Ecc. 332; Winslow v. Tarbox, 18 Me. 132; Morgan v. Shinn, 15 Wall. 105.

3 Fisher v. Willing, 8 S. & R. 118.

gains or has the opportunity of so doing, ought to pay the debts incurred for the fitting out, supply and navigation of the vessel which is to produce for him those earnings, and not the person who merely holds a lien on her without any profit or use of the vessel. It is for the owner or mortgagor that the master is regarded as the agent, and can bind him by his orders for supplies furnished to the vessel, and it is for this reason that in all cases where the mortgagor is in possession, using, controlling and navigating a vessel, that he is to be deemed the legal owner, entitled to the earnings and liable for supplies, repairs and wages,[1] unless the mortgagor has surrendered or the mortgagee has taken possession of the vessel and she is employed in his service.[2]

§ 132. **Of the Rights of a Mortgagor and Mortgagee. Effect and Validity of Mortgages on Vessels, etc.**—A mortgage of a vessel is valid, though not recorded until the assignee of the owners, after their going into bankruptcy, receives an assignment of their property, and gives public notice thereof.[3] Thus where the owners of one-half of a vessel, some months previous to their bankruptcy, conveyed by a bill of sale, as collateral security for a debt of $2,000, one-half of a vessel of which the other half was owned

[1] Fox v. Hall, 36 Conn. 558; Twentyman v. Hart, 1 Stark. N. P. 366; Chinnery v. Blackburn, 1 H. Bl. 117; Jackson v. Vernon, 1 H. Bl. 114; Fisher v. Willing, 8 S. & R. 118; Harrison v. Fry, 2 Bing. 179; Weber v. Sampson, 6 Duer, 358; Howard v. Odell, 1 Allen, 85; Trewhella v. Row, 11 East. 435; Irving v. Richardson, 2 B. & A. 193; Winslow v. Tarbox, 18 Me. 132; Morgan v. Shinn, 15 Wall. 105.

[2] McIntyre v. Scott, 8 Johns. 159; Champlin v. Butler, 18 John. 169; Ring v. Franklin, 2 Hall, 1; Tucker v. Buffington, 15 Mass. 477; Colson v. Bonsey, 6 Me. 474; Winslow v. Tarbox, 18 Me. 132; Cutter v. Thurlo, 20 Me. 213; Miller v. Spinola, 4 Hill. 177.

[3] Leland v. The Medora, 2 W. & M. 92; Winsor v. McLellan, 2 Story, 492.

by the master, and agreed to assign all future policies of insurance thereon as further security for the same debt, which was done, it being agreed that the mortgagors might use the vessel for their own benefit until default of payment. The bill of sale was not recorded. The vessel at the time the bill of sale was made was at sea in the possession of the master. Between that time and the filing of the petition for the benefit of the bankrupt law by the mortgagors, the vessel came once to Boston, the place of business and residence of the mortgagors, and twice to Bath the residence of the master, but the mortgagees did not take possession. Five days before the filing of the petition, they sent notice to the master of the bill of sale, the said mortgaged moiety having been sold by direction of the assignee. It was held that the proceeds of the sale should be paid to the mortgagee.[1] So, where there is an absolute conveyance which is in the nature of a mortgage, it is good between the parties though not recorded, and where creditors seeking in equity to charge the boat in the hands of the mortgagee, they can only claim, in the absence of fraud, the surplus after his own claim is satisfied.[2] So, where a mortgagor sells a vessel in a distant State, without authority of the mortgagee, the mortgagee may subject the proceeds of the sale to the payment of his mortgage.[3] But where a mortgagee fails to comply with the laws and keeps his mortgage from being registered, so as not to give notice to the world of his lien, he will not be allowed to claim under such mortgage. Thus, where a shipbuilder built several ships and sent them to England for sale, the mortgages were duly registered in the United States;

[1] Winsor v. McLellan, 2 Story, 492.

[2] Merrick v. Avery, 14 Ark. 370.

[3] McLaren v. Brewer, 51 Me. 402.

but notice of the mortgage having been indorsed on the certificate of registry, and having impeded the sale, it was agreed that no such notice should be endorsed for the future. Another ship was accordingly sent over and sold. The shipbuilder received the money and failed. The mortgagee filed his bill against the purchaser, and it was held that even if the purchaser of a foreign ship is bound to enquire as to the title, the mortgagor had so acted in this case as to suppress the mortgage, and to make the shipbuilders his agents for the sale, and that his bill could not be maintained.[1]

In the application of the proceeds of a vessel a mortgagee is entitled to priority over material men who, at the time of supplying materials, are not in such actual possession of the vessel as to give them a possessory lien,[2] and is to be paid in preference to supplies and materials furnished in the home port.[3] Where there are subsequent mortgages, and the mortgages are made subject to the prior ones, the prior mortgagee, in case of loss, will be protected. Thus, where the owner of a vessel mortgaged one-half to A., and subsequently mortgaged the whole of her to B. and C., expressly subject to A.'s lien, B. and C. effected an insurance on their interest, and the vessel becoming a total loss, abandoned her to the underwriters, it was held that A. was entitled to one-half the salvage.[4]

And where A., part owner of a vessel which was at sea, mortgaged his interest therein to B. After the vessel returned, A. mortgaged all his interest in her, "her appur-

[1] Hooper v. Gunn, L. R., 2 Ch. 282.

[2] The Scio, Law Rep., 1 Ad. & Ecc. 353; The Grace Greenwood, 2 Biss. 131.

[3] Miller v. Proceeds, &c., 8 Chi. Leg. News, 388; The Skylark, 2 Biss. 251; Lady Franklin, 2 Biss. 121; The Lottawana, 21 Wall. 558; The Gen. Smith, 4 Wheat. 443.

[4] Rice v. Cobb, 9 Cush. 302.

tenances, outfits, cargo, and catchings," to C., stating in this last mortgage, that the hull of said vessel was subject to B.'s mortgage. A. and the other owner of the vessel fitted her out for a whaling voyage, with the knowledge of B., and A. furnished his portion of the outfits for the voyage. A few days before the vessel sailed on said voyage, B. took formal possession of her under his mortgage, when no one who was interested in her was on board, but gave no notice to A. that he had so done. On the return of the vessel from that voyage, her cargo was sold by an agent thereto appointed by her several owners, and the proceeds came into his hands. Held, as between B. and C., the mortgagees, that C. was entitled to A.'s share of the proceeds.[1]

A mortgagee has a right to take possession of the vessel and sell her, in case of default, in order to satisfy his debt, and, until such default, the mortgagor may retain possession, and by the consent of the mortgagee sell the vessel for the purpose of paying the debt. Thus, where a vessel was mortgaged with the agreement that the mortgagor should keep her to sell for the payment of the mortgage debt, it was held that the right of possession of the mortgagor did not deprive the mortgagee of the right to take actual possession as against a wrongdoer; the mortgagor being properly the agent of the mortgagee and having a qualified possession for the latter's benefit.[2] So, where a vessel had been mortgaged to secure certain notes, with a clause authorizing the mortgagee to sell on default of payment, and proceedings at law had been commenced theron, the mortgagee agreed by letter to extend the time upon his mortgage, on condition that the vessel should be run

[1] Milton v. Mosher, 7 Met. 244. [2] Foster v. Perkins, 42 Me. 168.

between two particular ports, and the net earnings paid over to him: held, that the mortgagee had not waived his right to sell by this agreement, and the moment the condition named by his letter was repudiated by the mortgagor, this right revived with all its former force,[1] and where the mortgagee takes possession after default, and sells the vessel, no action will lie against him for conversion, although when he takes possession he makes no claim of taking her under the mortgage, and the sale is not in accordance with the terms of the mortgage.[2]

A mortgagee cannot claim any lien upon the earnings of the vessel while it remains in the possession and control of the mortgagor; he may take possession upon default or breach of condition, but he cannot compel a specific appropriation of her earnings to the payment of his debt.[3] Nor will any equities existing between the joint mortgagors of a vessel deprive the assignee of a mortgage of any of the usual remedies for the enforcement of the security.[4] But a mortgagee of a ship, and all freight earned by her, who takes no steps to enforce his mortgage until an assignee of a particular freight notifies the party who chartered the vessel, and the cargo is partially discharged, loses his priority of claim in favor of such assignee.[5]

A mortgage of a steamboat, or other water craft, does not withdraw such craft from the operation of a State law authorizing proceedings against her by her name.[6] Where a vessel which is really owned by Amer-

[1] Fox v. Kitton, 19 Ill. 519.
[2] Murray v. Erskine, 109 Mass. 597.
[3] Tenney v. State Bank, 20 Wis. 152.
[4] Dalrymple v. Sheehan, 20 Mich. 224.
[5] Brown v. Tanner, Law R., 2 Eq 806.
[6] Provost v. Wilcox, 17 Ohio, 359.

icans, but is fraudulently sailed as a British vessel, is mortgaged, the courts of this country will not, upon principles of comity, sustain such mortgage, as it would be rejected by the courts of Great Britain as founded on a sham title.[1] And where a mortgage is made of a vessel to secure money loaned for the benefit of the vessel, and such mortgage is made by the nominal owner, while the loan is to the real owner, and in the instrument there is no covenant by the mortgagor to pay, he is not personally liable for the debt.[2]

[1] The Acme 2 Ben. 383.

[2] Jenkins v. Wheeler, 2 Abb. N. Y. App. 442.

# BOOK III.

OF THE RIGHTS OF PARTIES.—OF THE MORTGAGEE.—ORDINARY CREDITORS.—PURCHASERS.—JUDGMENT CREDITORS.—OF THE MORTGAGOR'S INTEREST PRIOR TO AND AFTER DEFAULT.—ASSIGNMENT OF MORTGAGES.—PAYMENT AND SATISFACTION.—REMEDIES OF THE MORTGAGEE.—FORECLOSURE AND REDEMPTION.

## CHAPTER XIV

### RIGHTS AND LIABILITIES OF THE MORTGAGEE.

RIGHT OF MORTGAGEE DEPENDS ON *bona fides* OF THE TRANSACTION.—REMEDIES AGAINST PARTIES INTERFERING WITH MORTGAGED PROPERTY.—REMEDY OF MORTGAGEE AGAINST TRESPASSERS.—RIGHT OF MORTGAGEE TO BRING AN ACTION TO RECOVER THE PROPERTY OR ITS VALUE.—WHEN A MORTGAGEE HAS NO REMEDY.—OF THE MORTGAGEE'S RIGHT TO INSURE HIS INTEREST.—SUBROGATION OF INSURANCE COMPANY.—DAMAGES FOR WHICH A PARTY IS LIABLE TO MORTGAGEE.—RIGHTS OF MORTGAGEE AFTER DEATH OF MORTGAGOR.—WHEN IN POSSESSION.—EFFECT OF ALLOWING THE MORTGAGOR TO REMAIN IN POSSESSION AFTER DEFAULT.—WHEN A MORTGAGEE LOSES HIS PRIORITY.—RIGHTS OF PARTIES WHERE THERE ARE SUCCESSIVE MORTGAGES.—RIGHTS OF JUNIOR MORTGAGEES.—AS DEPENDENT ON NOTICE.—TO CONTEST PRIOR MORTGAGES.—TO REDEEM.

§ 133. The rights of a creditor, secured by a mortgage, depend in a great measure upon the contract of hypothecation, and in many cases upon the *bona fides* of the transaction. As between mortgagor and mortgagee, it matters not whether the mortgage be valid or void, it is a security which he make available, but, as to third

parties, the validity of the transaction governs the mortgagee's rights; as regards creditors and purchasers, their rights are examined in a subsequent chapter. A mortgage, while it is a mere security, confers certain rights and benefits which the creditor may take advantage of upon a compliance with the statutory requirements; he must act in good faith, and be guilty of no negligence in protecting his security; he must not act so as to deceive or mislead others dealing with his debtor; nor can he permit him to deal with the incumbered property as if it were his own. A mortgagee's right is to have his security made available to the satisfaction of his debt, and in order to obtain this satisfaction in preference to the claims of other creditors, there must be no collusion nor fraudulent dealings with his debtor, so as to make the mortgage an instrument whereby the property is withdrawn from the reach of creditors, for the purpose of hindering them in the enforcement of their rights. The law will protect the right of a mortgagee, and if the property is taken from the possession of the debtor by any other creditor, he may, if his mortgage so provide, recover possession of it; he has such a title—such a special ownership in the property as to give him the right to recover it for the purpose of satisfying his claim. In Alabama, if the property is taken before the maturity of the debt, he may interpose a claim to try the right of property,[1] or he may file a bill to ascertain and separate his interest, from that which remains in the debtor, in consequence of the stipulation that he shall remain in possession until breach of the condition of payment.[2]

[1] Floyd v. Morrow, 26 Ala. 353.

[2] Marriott v. Givens, 8 Ala. 694.

It is a well-settled principle of law in almost all the States of the Union, that until foreclosure, or at least until breach of condition, the debtor has such a valuable interest in the property mortgaged as to render it liable to attachment in the New England States, or subject to levy and sale by virtue of an execution in the other States (chap. XV, Rights of Creditors). While the rights of a mortgagee will be protected both at law and in equity, the mortgagor and his creditors have rights, also, prior to default and foreclosure. The right of the mortgagor to remain in possession, may be stipulated for in the instrument, or it may be acquiesced in by the mortgagee. It is such a right as can be levied on and sold on execution in almost all the American States, with the exception of Massachusetts. Where a mortgagor is left in possession of the property, or where it is delivered to the mortgagee, it may be sold on execution prior to default. A mortgagee cannot maintain replevin against an officer who, by virtue of an execution against the mortgagor, takes mortgaged property out of the possession of the mortgagor before a sale thereof, though the officer may threaten to sell it irrespective of the mortgage. In such a case, the title of the mortgagee is conditional without the right of possession.[1] After default, the mortgagee's right of possession being unimpaired, he may obtain possession from the purchaser and enforce his rights, and a sale made by the officer is of the mortgagor's interest with his equity of redemption,[2] and if the whole of the property has been

[1] Shinners v. Brill, 38 Wis. 648; Saxton v. Williams, 15 Wis. 292; Smith v. Coolbaugh, 21 Wis. 427; Fraker v. Reeve, 36 Wis. 85; Goulet v. Asseler, 22 N. Y. 225; Gordon v. Harper, 7 T. R. 8; Bradley v. Copley, M. G. & S. 685; Van Antwerp v. Newman, 2 Cow. 543; Hull v. Carnley, 11 N. Y. 541; Fugate v. Clarkson, 2 B. Mon. 41.

[2] Manning v. Monnahan, 1 Bosw 459; Cotton v. Walkins, 6 Wis. 629.

sold in place of the mortgagor's interest, he may maintain replevin for the property.

The detention by an attaching or execution creditor, or a purchaser after default and demand, is, as against the mortgagee, a conversion of the property for which an action will lie.[1] The mortgagee has the right in such case to obtain possession for the purpose of satisfying his debt. Prior to foreclosure, a mortgagee has no interest which is liable to levy; his claim is a mere *chose in action*.[2] It is held by many courts that after default, or after the mortgagee takes possession in conformity with the terms of a mortgage, he cannot be deprived of possession under a subsequent levy against the mortgagor,[3] but that the execution creditor's remedy is by garnishee process against the mortgagee.[4] (But see *post*, chap. XVI, on the rights of judgment creditors.) If the mortgagee has never been in possession of the mortgaged property, he is not bound after garnishment by a creditor of the mortgagor to take possession of the property for the benefit of such creditor, and he cannot, in the absence of fraud or collusion, be held liable for the same, though it exceed in value the amount of the mortgage.[5]

In Massachusetts it is held that after the mortgagee is summoned as a trustee or garnishee he cannot foreclose his mortgage.[6] It is only in case where the mortgagee makes a sale of the property, or is in possession

[1] Fairbanks v. Bloomfield, 5 Duer, 434; Frisbie v. Langworthy, 11 Wis. 375; Kannaday v. McCarron, 18 Ark. 166.

[2] Prout v. Root, 116 Mass. 410; Thornton v. Wood, 42 Me. 282.

[3] Nelson v. Wheelock, 46 Ill. 25; Moore v. Murdock, 26 Cal. 514.

[4] Pike v. Colvin, 67 Ill. 227.

[5] Curtis v. Raymond, 29 Iowa, 52; First National Bank v. Perry, 29 Iowa, 266.

[6] Hobart v. Jouvett, 6 Cush. 105.

after default that he should be held liable in garnishment proceedings; if the mortgaged property sells for more than enough to pay the debt and expenses, the mortgagor, if the property is exempt, is entitled to the surplus; if it is not exempt, his creditors should be. That other unsecured creditors should be remediless in enforcing their claims, is establishing a doctrine that is unsound, and one which cannot be sustained. If the instrument is a mortgage, it is always a mortgage, whether before or after default, and until foreclosure the mortgagee's rights are not such as to deprive every other creditor of his claim against the property subject to the prior lien, nor does it absolutely divest the mortgagor's title. Where a mortgagee claims title against a purchaser under a judgment creditor of the mortgagor, he cannot take the property simply on the ground of there being a mortgage on record to him of the property; he must prove the consideration of the mortgage, that it was *bona fide*, and that the mortgage was properly filed or recorded.[1] But where it is shown that the mortgage was executed and registered in conformity with the statute, and it is made to secure a promissory note on which the mortgagee is surety, such a mortgage will be *prima facie* evidence of the title of the mortgagee, and the burden of proof will be on the party contesting the mortgage, to show that there is no such note.[2] And in an action of replevin by the mortgagee against an officer attaching, where the defense is that the mortgage is fraudulent as to creditors, the officer must prove the existence of the debt on which the writ was issued.[3] In Massachusetts, where the mortgagor goes into insol-

[1] McGuinty v. Reeves, 10 Ala. 137; Groat v. Rees, 25 Barb. 26; Matlock v. Straughn, 21 Ind. 128.

[2] Davis v. Mills, 18 Pick. 394; Marsh v. Armstrong, 20 Minn. 81.

[3] Braley v. Byrnes, 20 Minn. 435.

vency under the State law, after an attachment has been levied, it is held that the officer should deliver possession of the property to the mortgagee and not to the mortgagor's assignee,[1] thus depriving his creditors of any benefit to the surplus. Why the mortgagee cannot enforce his rights, under proceedings in insolvency, is an anomaly, as a mortgagee's rights, if the mortgage is valid, are prior to that of any creditor, and a mortgagee has a prior equitable lien for the payment of the mortgage debt on the proceeds of the mortgaged property, where it is sold by the assignee in bankruptcy, or an assignee of the mortgagor, for the benefit of creditors,[2] and he cannot be deprived of such priority, unless it is by his own negligence.

But where a mortgage is void as to creditors and valid as between parties, and the mortgagor is thrown into bankruptcy, and under the exemption law a portion of the property incumbered is set apart under the bankrupt law for the use of the mortgagor, that part set off is liable to the satisfaction of the mortgage debt, and may be taken by the mortgagee[3] for such purpose. In Illinois the courts have established a rule that compels a mortgagee to take possession immediately after default and obtain satisfaction of his debt; if he is guilty of any negligence, and a delay of four or five days after default has been held sufficient, a levy and sale by any creditor of the mortgagor of the mortgaged property will pass a good title to the purchaser.[4] In Massachusetts, under the statute requiring the mortgagee to make a demand for payment upon the attaching officer, an action of replevin brought by the mort

1 Horne v. Bartlett, 8 Allen, 290.
2 Wilson v. Gray, 2 Stockt. 323.
3 Tuesly v. Robinson, 103 Mass. 360.
4 Read v. Eames, 19 Ill. 594; Constant v. Matteson, 22 Ill. 546.

gagee against the officer, although the property is moved out of the State, will not affect the mortgagee's right to demand and receive from the attaching creditor the amount which he is liable for under the mortgage.[1] In California, where the decisions from the New York courts are followed, it is held that where a mortgagee establishes his claim under his mortgage against an officer taking the property on legal process, the mortgagee is entitled to the property in preference to the creditor.[2] If the mortgagee purchases a claim secured by a prior attachment lien on the property, he will acquire an equitable lien as against attachments levied subsequently to the mortgage for the money thus expended, though the statutory lien by the enforcement of the mortgage may be technically extinguished,[3] and if he sells the property at a private sale in good faith, he will be chargeable with the amount realized and not with the value of the property when taken on attachment.

Whenever an officer seizes mortgaged property, either by virtue of mesne or final process, and the property is subject to a valid mortgage, the seizure or levy is made subject to the right or interest of the mortgagee. If the mortgagee assign the mortgage, any levy will be made subject to the assignee's rights;[4] and if the mortgage stipulates that the mortgagor is to retain possession until maturity of the debt, unless the property is levied on, the assignee has the same right to take possession as the mortgagee, in case of a levy. So in case a creditor recognizes a mortgage as valid,

[1] Moore v. Guirk, 105 Mass. 49.
[2] Stringer v. Davis, 35 Cal. 25.
[3] Armstrong v. McAlpine, 18 Ohio S. 184.
[4] Beach v. Derby, 19 Ill. 617.

and makes arrangements with the mortgagee by which he is to realize his debt, such creditor cannot, on subsequently ascertaining that the mortgage was void as to him by reason of being unrecorded, defeat the mortgagee's claim. Thus, where, in an action in the nature of a creditor's bill, brought to set aside a transfer of property as fraudulent, the court appointed a receiver and directed the property to be sold subject to such incumbrances as were on it, when the transfer was made, an unfiled chattel mortgage, held by one not a party to the action, was a lien on the proceeds of the sale as against the judgment creditor, the judgment creditor having made an arrangement with the mortgagee to have the property sold, free from all incumbrances, which the mortgagee allowed on condition that his mortgage should be first paid out of the proceeds. The judgment creditor was afterwards estopped from objecting to the mortgage on the ground that it was not filed, even though he was ignorant of that fact at the time of his agreement.[1]

§ 134. **Right of a Mortgagee to Bring an Action to Recover the Mortgaged Property or its Value.**—The modifications which are being constantly made in regard to the rights of mortgagor and mortgagee, and the relaxation of the rigid rules of construction in regard to the nature and effect of a chattel mortgage, necessarily create a number of conflicting decisions which are difficult to harmonize or reconcile; while many of them are based upon common law principles, many more are the result of statutory construction, while the later cases are the result of the blending of legal

[1] Lane v. Lutz, 3 Abb. N. Y. App. Dec. 16.

and equitable principles and the rules of the civil law. The result is a variety of cases establishing antagonistic rules—rules applicable in one State, and inapplicable in another. In Kansas, and perhaps other States, by statutory provision, a mortgagee, in the absence of any stipulation in the mortgage, is entitled to possession. In others States, in the absence of such provision, it has been judicially determined that the mortgagee is so entitled; in others, there have been decisions for and against this right. In a preceding portion of this work, *ante*, ch. IX, we have examined this question. As the right of a mortgagee to bring an action against any one interfering with the possession of the property prior to default, depends upon his own right of possession, it will not be necessary to re-examine that question here, but the question as to recovery of possession. A mortgagee, like a sheriff, has such a special property or title in the chattels mortgaged, as to give him a right of action against any one interfering with the property so as to deprive him of his security. He may bring an action for damages to his reversionary interest, although he has not a right to immediate possession,[1] and where he has caused a seizure and sale to be enjoined, he may recover the property on showing, by his affidavit, probable cause to apprehend that the debtor will remove the mortgaged property beyond his reach.[2] The right of a mortgagee of personal property to recover possession of the property from a purchaser, or anyone interfering with his security, is the necessary result of the nature of the property. In regard to mortgages of land, a mortgagee is entitled to the aid of a court of equity to stay waste and prevent the commission of any act which

[1] Googins v. Gilmore, 47 Me. 9. [2] Patterson v. Hall, 1 La. 108.

will injure his security. In regard to chattels, the very nature of the property requires a remedy equivalent to that in case of land. Personal property being readily moved from one jurisdiction to another, and having no *situs*, but that of its owner, and being destructible by, and consumable by, use, in order to prevent the impairment of the security, there must be, as a matter of course, a speedy and effective remedy to prevent fraud and oppression. In cases where the mortgagor is left in possession, and an officer, by virtue of process, deprives him of possession, and after sale of the mortgagor's interest, delivers the property to the purchaser, a stranger to the transaction, he might consume, destroy or remove it beyond the reach of the mortgagee. In order to prevent any disposition of the property detrimental to the mortgagee, it has become necessary to give him the right to recover possession of the property for the purpose of subjecting it to the satisfaction of his claim. In order to arrive at a result which may upon principle protect the rights of the mortgagee whenever his security is in danger, or when the incumbered property is sought to be rendered available for the satisfaction of other claims than that for which it is hypothecated, it will be necessary to examine the various cases and ascertain the remedy. The first class of decisions proceeding upon the common law doctrine, that a mortgage of chattels conveyed an absolute title in the mortgagee, defeasible only upon a strict compliance with the conditions of the contract, establish the mortgagee's right to recover possession by proceedings in replevin whenever the property is taken, by virtue of any process against the mortgagor, at the instance of any of his general creditors, on the ground that where there is no express stipulation to the contrary, the right of pos-

session follows the right of property, and that, in the absence of any stipulation in the mortgage allowing the mortgagor to retain possession, the right of immediate possession, together with the property in the chattels, vests in the mortgagee, and that he may maintain an action against any one taking them from the mortgagor[1] before maturity of the note or breach of condition. And this where the mortgage stipulated that the mortgagee might retain possession and sell the mortgaged property for the payment of the debt;[2] and that any person other than the mortgagee, or some person claiming under him, take the property from the mortgagor, such person will be liable for more than nominal damages.[3] That no third party can lawfully remove the property without first offering to discharge the mortgage,[4] and this where the mortgagor retains possession and disposes of it.[5] The mortgagee may maintain an action against anyone who wrongfully takes it away without giving notice to the mortgagor, or the person in possession, of his intention to foreclose.[6] And such action may be maintained, even though the debt for which the mortgage is given has not become due.[7]

Another class of decisions establish the right of the mortgagee to maintain replevin against a person

[1] Pickard v. Low, 15 Me. 48; Brackett v. Bullard, 12 Met. 308; Coty v. Barnes, 20 Vt. 78; Case v. Winship, 4 Blackf. 435; Melody v. Chandler, 12 Me, 282; Miller v. Pancoast, 5 Dutch. 250; Dean v. Davis, 12 Mo. 112; Spriggs v. Camp, 2 Speers, 181; Holmes v. Sproul, 31 Me. 73.

[2] Melody v. Chandler, 12 Me. 282; Forbes v. Parker, 16 Pick. 462; Welch v. Whittemore, 25 Me. 86; Ferguson v. Thomas, 26 Me. 409.

[3] Tallman v. Jones, 13 Kan. 438.

[4] Worthington v. Hanna, 23 Mich. 530.

[5] Pickard v. Low, 15 Me. 48.

[6] Brackett v. Bullard, 12 Met. 308.

[7] Woodruff v. Halsey, 8 Pick. 333; Foster v. Perkins, 42 Me. 168; Stamps v. Gilman, 43 Miss. 456; Hotchkiss v. Hunt, 49 Me. 213.

taking the property in defiance of his right, where the terms of the mortgage entitle the mortgagee to take possession whenever he deems it desirable or necessary.[1] These cases depend upon the conditions in the instrument itself. Many mortgages, where the mortgagor retains possession, contain stipulations that, in case of a levy upon the property, or a removal of it, or in case the mortgagee feels insecure, he may take possession. Almost all the cases which have been cited were cases where mortgaged property was attached or levied on by virtue of an execution against the mortgagor. While it may be laid down as a general rule that the interest of the mortgagor is liable to sale, the rule established in New York in regard to the right of the mortgagee is the correct one: that the only remedy of the mortgagee is, after breach of condition or default, to require the payment of his mortgage debt, or else require the delivery of the property for the purpose of sale in satisfaction of his debt.[2] As the mortgage is a mere security for the debt, if that is paid by the purchaser or the mortgagor, the mortgage lien is satisfied, and the mortgagee's claim to the property is discharged. The cases first cited, establish a doctrine that cannot be sustained on principle. If a mortgage contains a stipulation that the mortgagor is to retain possession of the property until condition is broken, or if the debt is payable on demand, and the mortgagor is to retain possession until default in payment, the mortgagee is not entitled to the possession until default or demand

[1] Welch v. Sackett, 12 Wis. 243; Cotton v. Watkins, 6 Wis. 629.

[2] Hathaway v. Brayman, 42 N. Y. 325; Hall v. Sampson, 35 N. Y. 274; Hull v. Carnley, 11 N. Y. 50; S. C., 17 N. Y. 202; Goulet v. Asseler, 22 N. Y. 228.

has been made.[1] If the mortgagee takes possession of the property prior to such default, he will be liable to the mortgagor for such taking. In order to maintain an action of replevin, the mortgagee must have the property in the goods, and an immediate right to reduce them into possession, and not having this right under such a mortgage, he can maintain no action either against an officer or a purchaser of the mortgaged property, until such right vests in him by default of payment. A mortgagee, not in possession, may maintain an action for injuries to the mortgaged property by which the security is impaired,[2] whether it be by destruction or asportation. A mere sale of mortgaged property will not itself support such an action. But any act by which the mortgagee suffers injury through the loss of his security will be sufficient, as in the case of a sale of the property in small lots in an auction-room. The action can only be sustained to the extent to which the mortgagee has suffered actual injury from the loss of his security. If the mortgagor deals fraudulently with the mortgaged property left in his possession, the mortgagee may immediately commence an action for the recovery of the goods or their value.[3] Where a mortgagor induces a mortgagee to allow the property to remain in his possession, and the mortgagor, for the purpose of defrauding the mortgagee, sends the goods away for sale, and the proceeds of the sale are paid to the mortgagor, the mortgagee may maintain an action

[1] Bradley v. Copley, 1 C. B. 697; Brierly v. Kendall, 17 Q. B. 937; Curd v. Wunder, 5 Ohio St. 92; Redman v. Hendricks, 1 Sand. 32; Hathaway v. Brayman, 42 N. Y. 322.

[2] Robinson v. Russell, 24 Cal. 467; Cunningham v. Hawkins, 24 Cal. 403; Van Pelt v. McCraw, 4 N. Y. 110; Manning v. Monnaghan, 23 N. Y. 539; Googins v. Gilmore, 47 Me. 9; Freeman v. Freeman, 2 Green, N. J. 44; McCandless v. Moore, 50 Mo. 511.

[3] Fenn v. Bittleston, 7 Exchq. 152.

against the seller, although he did not participate in the fraud, or had any knowledge of the existence of the mortgage, which was duly recorded,[1] or if there be probable cause that the property will be removed to the injury of the mortgagee, he may attach it.[2] The mortgagee, upon a proper showing, will be entitled to relief, and the protection of his security in case of injury or apprehended danger. But to allow him to maintain an action against an officer selling, or a stranger purchasing, the mortgagor's title and interest in the property, will be giving a construction to the contract of hypothecation contrary to the very nature of the instrument itself.

A mortgagee, in possession, need not renew his mortgage by affidavit in order to maintain an action for the possession of the property taken from him while the mortgage continued in full force.[3] The cause of action accrues when the property is taken, and the rights of the parties must be determined as they stood at that time. If the mortgagee has a cause of action, nothing but a release will deprive him of it, and if his mortgage expires, as to creditors and purchases, one day after his right of action vests in him, he need not renew the mortgage by re-filing, in order to maintain such right. So, a mortgagee in possession may, without fraud, redeliver possession of the property to the mortgagor, as his agent, and may bring trover against third persons for its conversion.[4]

1 Coles v. Clark, 3 Cush. 399.

2 Patton v. Haines, 15 B. Mon. 607; Patterson v. Hall, 1 La. 108.

3 Bates v. Wilbur, 10 Wis. 415.

4 Cotton v. Marsh, 3 Wis. 221.

§ 135. **When a Mortgagee cannot Maintain an Action.**—If a mortgagee, by the circumstances of the case, would be precluded from pursuing the property mortgaged into the hands of a *bona fide* purchaser, he is equally debarred as against a judgment creditor, or an officer who has levied upon the property by an execution.[1] Nor can he recover in an action for alleged conversion of the property against a purchaser from the mortgagor in possession, where such purchaser has sold and delivered the property to a third person, before default in payment of the mortgage, and before demand of possession by the mortgagee, although such mortgagee is empowered by the terms of the mortgage, which is duly filed, to take possession at any time, in case he deems himself unsafe.[2] So, where the mortgagor, who retains possession, puts the property on board the vessel of a belligerent, it is subject to capture, and the mortgagee is without remedy.[3] So, where property subject to several mortgages is sold on execution and purchased by one of the mortgagees, who pays the other mortgage debts, and there is but one mortgage on the property, which is held by the purchaser, such mortgagee cannot bring suit on his own mortgage note, for the reason that the mortgage is extinguished by the sale, and the mortgage notes are paid by the transaction. The mortgagee, being the owner of the property, cannot foreclose against himself, nor sell the property to pay himself.[4] He was paid by operation of law.

[1] Divver v. McLaughlin, 2 Wend. 596; Gapp v. Harding, 48 Ill. 198.

[2] Hathaway v. Brayman, 42 N. Y. 322.

[3] Belchos v. Three Slaves, Bee. 74.

[4] Merritt v. Miles, 25 Ill. 282.

§ 136. **Right of the Mortgagee to Insurance.** —A mortgage of property, by a debtor, confers an interest on the creditor or mortgagee, which he may protect by a policy of insurance. Injury to the property hypothecated necessarily diminishes its value as a security, and may, by total loss, result in the loss of the debt. The right of a mortgagee to insure is well settled.[1] The lien or security of the mortgagee is not only an insurable interest, but one which may be covered by a policy in the ordinary form without specifying the special and limited nature of the right insured. In an action by the mortgagee against an insurance company to recover for a loss under the policy insuring his interest, the fact that the mortgagor is still solvent, and remains his debtor, will constitute no defense. The question is not, in cases of this sort, whether the party has actually lost his debt, but the question is, whether he has lost the security for the debt by the perils insured against, which the insurance company agreed to assume upon themselves. A mortgagee may recover his insurance if the mortgaged property is lost or destroyed, although the mortgagor still remains his debtor, and is solvent. The extent and nature of the insurable interest of a mortgagee is a question of considerable difficulty, as the decisions are not reconcilable, one class of cases establishing the doctrine that the insurance company, in case of payment of loss, are not entitled to subrogation, and the other class of cases, that payment is a purchase of the mortgagee's interest, which entitles the insurance

1 French v. Rogers, 16 N. H. 177; Fulton v. Brooks, 4 Cush. 203; Connover v. Ins. Co., 1 N. Y. 290; Jackson v. Ins. Co., 23 Pick. 413; Ayres v. Home Ins. Co., 21 Iowa, 185; Ayres v. Hartford Ins. Co., 17 Iowa, 176; Woodruff v. Ins. Co., 2 Dutcher, 54; Wilson v. Martin, 11 Exchq. 684; Lee v. Barrada, 16 Md. 198; Caruthers v. Shedden, 6 Tamt. 14.

company to be subrogated to his rights as against the mortgagor. The distinction made by the courts arises from the effect given to a mortgage at law and in equity; the modification of the rigid common law rules in regard to the title of the mortgagee before forfeiture and foreclosure, and the adoption, both by courts of equity and of law, and especially under the reformed codes of procedure of the civil law rules, that a mortgage is a mere security instead of a conveyance of an absolute title. There can be no doubt but that all the insurable interest a mortgagee obtains is derived from the lien which he obtains by reason of his security. An unsecured creditor has no interest in his debtor's property which can be insured; he may have in his debtor's life, but not in personal or real property. So that where a mortgagee who, without any agreement between him and his debtor, obtains an insurance, he simply insures his debt, and if, before any loss occurs, his debt is paid or extinguished, his insurable interest terminates.[1] In case of loss, the insurer is entitled to be subrogated to the mortgagee's claim;[2] in order to effect this right of subrogation, the mortgagee must insure his interest, and if the property is destroyed by fire, the payment of loss or damage works a transfer of his debt to the insurer. If there is no agreement between the mortgagee and mortgagor, the mortgagor is not entitled to any allowance against the loss in the reduction of his debt.[3] In such case all the mortgagee is entitled to recover is the

[1] Carpenter v. Ins. Co., 16 Pet. 495; Ins. Co v. Woodruff, 2 Dutch. 541; Smith v. Ins. Co., 17 Penn. St. 253.

[2] Sussex Co. Ins. Co. v. Woodruff, 26 N. J. Eq. 541; Honore v. Lamar Ins. Co., 51 Ill. 409; Norwich Ins. Co. v. Boomer, 52 Ill. 442; Ætna Ins. Co. v. Tyler, 16 Wend. 385; Smith v. Ins. Co., 17 Penn. 253; Carpenter v. Ins. Co., 16 Pet. 495.

[3] White v. Brown, 2 Cush. 413; King v. Ins. Co., 7 Cush. 1; Cushing v. Thompson, 34 Me. 46; Concord Ins. Co. v. Woodbury, 45 Me. 447.

amount of his own debt; that is the extent of his interest,[1] and in such case he cannot charge the mortgagor with the cost of the insurance.[2] But where there is an agreement in the mortgage which makes the mortgagor liable for the premium, and the mortgagee obtains the insurance at the mortgagor's cost, or the mortgagor insures the property and assigns the policy to the mortgagee, with the consent of the underwriters, as collateral security, the insurance does not displace the interest of the mortgagor in the property, and if there be a loss, it is the mortgagor's loss, and he is entitled to the money appropriated to the discharge of his indebtedness.[3] The mortgagee is bound to account for the money received, in the same manner as a mortgagee of real estate is for rents and profits. If there are several notes, payable at different times, secured by the mortgage, and have become overdue, such insurance money is appropriated first to the payment of interest on all the notes, and the surplus, if any, to the payment of the principal in the order in which they respectively fall due.[4] Where a mortgagor effects an insurance on his own interest, a mortgagee has no right or interest in the policy,[5] unless the policy is assigned to him by the consent of the insurer. If a mortgagor stipulates in the instrument that he is to procure an insurance to the amount due for the mortgagee's benefit, and the violation of such condition is a default which renders

1 Smith v. Col. Ins. Co., 17 Penn. 253; Ogden v. Ins. Co., 4 U. C. C. P. 497.

2 Saunders v. Frost, 5 Pick. 259; Dobson v. Leonard, 8 Hare. 216.

3 Concord Ins. Co. v. Woodbury, 45 Me. 447; Foster v. Van Reed, 5 Hun. 321; Norwich Ins. Co. v. Boomer, 52 Ill. 442; Carpenter v. Ins. Co., 16 Pet. 495.

4 Larrabee v. Lambert, 32 Me. 97.

5 Wilson v. Hill, 3 Met. 66; Powell v. Innes, 11 M. & W. 10; Columbian Ins. Co. v. Lawrence, 10 Pet. 507; Carpenter v. Ins. Co., 16 Pet. 495; Hancock v. Fishing Ins. Co., 3 Sumner, 132; McDonald v. Babcock, 20 Ohio, 185; Vandegraff v. Medlock, 3 Port. 389; Nichols v. Baxten, 5 R. I. 491.

the whole amount secured immediately due and payable, and gives the mortgagee a right of action on the contract, the procuring of the insurance by the mortgagee, after the default of the mortgagor, does not satisfy the stipulation or so inure to the mortgagor's benefit as to cure or discharge the breach on his part.[1]

§ 137. **Damages for which a Party is Liable for Taking Mortgaged Property.**—Where an officer is liable as a trespasser to a mortgagee or his assignee for taking the mortgaged property on an execution against the mortgagor, and holding it until the execution and costs are paid by the mortgagee or assignee, the measure of damages is the amount paid, with interest, and a reasonable compensation for the taking and detention.[2] Even if the mortgaged property, of a kind consumable by use, be sold by the mortgagor's creditors to different purchasers, the mortgagee can recover from the creditor only to the extent of the injury to his lien, and not to the full value of the property, as the interest of the mortgagor may be sold on execution, and, when sold, is sold subject to the mortgage lien. A mortgagee may recover the property, or its equivalent, in whosesoever hands it may be at the time he is entitled to it for the purpose of satisfying his debt,[3] and where a mortgagee brings trover, he cannot recover more than the amount due him; that is all he is entitled to. If he were to recover the full value of the property, the mortgagor would be entitled to recover the excess over the debt.[4] As long as the mortgagor

[1] Fowler v. Hoffman, 31 Mich. 215.

[2] Carpenter v. Cummings, 40 N. H. 158.

[3] Goulet v. Asseler, 22 N. Y. 225.

[4] Parish v. Wheeler, 22 N. Y 494; Manning v. Monnahan, 1 Bosw. 459.

has the right of possession, that is, prior to breach of condition or default in payment, a mortgagee has no cause of action against the creditor or officer taking the property. In order to bring trover, trespass or replevin, the plaintiff must be entitled to the possession of the property, and, in a case of this kind, the mortgagee is not entitled to possession. If the property is sold and so distributed among various purchasers as to prevent its being made available, or if it is lost, destroyed or moved to some distant State or Territory and thus lost to the mortgagee when he becomes entitled to the possession, he thereby sustains such an injury as will give him a right of action for the amount of the mortgage debt, and that is the extent of his damage. A junior mortgagee may bring an action against the officer who sells the property, before default or breach of condition in the prior mortgage, since he is thereby deprived of his right of redemption.[1] In order to give such mortgagee this right of action, his mortgage must be of record prior to the levy.[2] Where a mortgagee of part of a stock of goods kept for sale brings an action against an officer for an indiscriminate seizure and sale of the whole stock, it need not be shown what specific articles were covered by the mortgage, the sale of the whole stock must presume the sale of that mortgaged.[3]

§ 138. **Of the Mortgagee's Right to Fixtures.** —Personal property becomes a fixture, and, in many cases, part of the realty, after it has been mortgaged, unless there is a stipulation to the contrary. Where a

[1] Treat v. Gilmore, 49 Me. 34; Kimball v. Marshall, 8 N. H. 291.

[2] Rich v. Roberts, 50 Me. 395.

[3] Morrill v. Keyes, 14 Allen, 222.

person sells chattels to the owner of the soil, on an agreement that their character as personal property is not to be changed, and takes a chattel mortgage thereon to secure the purchase money, a prior mortgagee of the land cannot claim them as subject to the lien of the mortgage, although they are subsequently annexed to the freehold; upon failure to pay the chattel mortgage, the mortgagee or vendor, is entitled to their delivery,[1] nor will a mortgage of land defeat a prior mortgage of a frame building standing on the land, when the mortgagee of the realty at the time of the execution of his mortgage had full notice of the chattel mortgage.[2] And where certain property is mortgaged to one holding a mortgage upon the freehold, and is subsequently attached to the realty by the mortgagor, with the consent of the mortgagee, and afterwards the mortgages are assigned to different persons, the title to the personal property passes to the assignee of the chattel mortgage as against the assignee of the real estate mortgage.[3] In a proceeding to foreclose a mortgage upon a steam mill, in which the land upon which the mill stood was not included, subsequent purchasers of the mill and land with notice of the mortgage were made parties to the action; it was held that they were proper parties, and that they took the premises subject to the chattel mortgage.[4] Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant, held, that the mortgagees had a right to enter and sever fixtures, it not

[1] Tifft v. Horton, 53 N. Y. 377; Voorhis v. McGinnis, 48 N. Y. 278; Goddard v. Gould, 14 Barb. 662; Mott v. Palmer, 1 N. Y. 564.

[2] Simons v. Pierce, 16 Ohio S. 215 Sheldon v. Edwards, 35 N. Y. 279.

[3] Sheldon v. Edwards, 35 N. Y. 279; Smith v. Benson, 1 Hill. 176.

[4] Greither v. Alexander, 15 Iowa, 470.

being competent for the tenant to defeat his grant by a subsequent voluntary act of surrender.[1] But the registration of a mortgage, as a chattel mortgage, is not necessary to pass the interest of machinery fixed to the soil, if the intention of the parties, as shown by the terms of the instrument, is that the machinery should pass with, and as part of, the freehold.[2]

§ 139. **Rights of a Mortgagee after the Death of a Mortgagor.**—Personal estate or personal property, as a general rule, becomes assets in the hands of the administrator or executor, and is the primary fund for the payment of debts. Where a mortgage is made of personal property, whether it be valid or void as to creditors, if it be valid *inter partes*, it will be valid and binding as against the personal representatives of the deceased mortgagor, and may be enforced in the same manner as ordinary real estate mortgages. In Pennsylvania a different principle has been established; under a mortgage where the mortgagee had the right to take possession and sell in default of payment, and did, upon such default, after the death of the mortgagor, sell the property mortgaged, he was held liable in an action, by the administrator, for the value of the property sold, on the ground, that, upon the death of the mortgagor, his personal estate in possession passed into the custody of the law, to be administered for the benefit of all parties, and that the mortgagee has no right to take it in satisfaction of his own debt, whether sufficient property has been left by the decedent to pay the debts or not. It was also held that the mortgagee could not, in the

[1] London, &c. v. Drake, 6 C. B. N. S. 798.

[2] Potts v. N. J. Arms, &c. Co., 2 Green (N. J.), 395.

action of trover, set off the debt due him by the mortgagor against the value of the property converted, for the reason that, by allowing the set-off, would be to sanction the sale and would mix the remedies of tort and debt in the same action.[1] There is no statute governing mortgages of this kind in that State, and the mortgage was held void on the ground that the mortgagor remained in possession. This rule, while it may be good law in Pennsylvania, is not law in many other States; while it may be a universal principle that all personal property is on the death of its owner vested in the law or its agent, for the purpose of converting it into money and satisfying its owner's debts, it vests, subject to the liens and incumbrances which may be on the property at the time of such death, and if such liens are valid as against the debtor, they are valid as against his administrator, executor or personal representative. Thus, where the personal representative of a deceased mortgagor of chattels takes possession of the property, and holds it for his own benefit, he will be charged in favor of the mortgagee with its income, as where the chattels are horses, &c.[2] Even in Louisiana, where there is no statutory recognition of chattel mortgages, and where there is no such conveyance known as an ordinary chattel mortgage, a creditor having a special mortgage may obtain an order from a court of ordinary jurisdiction, for the seizure and sale of the hypothecated property, though the mortgagor has since died, and the succession has been accepted by the heirs.[3] The rights of the mortgagee are the same in a case of this kind as in the case of an ordinary pledge.

[1] Kater v. Steinruck, 40 Penn. 501.
[2] North v. Drayton, 1 Harp. Ch. 34.
[3] Boquille v. Faille, 1 La. 204.

§ 140. **Rights of the Mortgagee when in Possession of the Incumbered Property.**—In those States where a mortgagee is compelled to take possession of the property in order to obtain a valid lien, which will be protected in preference to the claims of other creditors and purchasers, and, generally, when the mortgagee, after default, obtains possession of the property mortgaged, for the purpose of satisfying his claim out of the proceeds realized from the sale of the property, he assumes the duty of treating the property as a provident owner would treat it.[1] He is responsible for ordinary diligence in the management and preservation of it, and is liable for ordinary neglect. If the property be destroyed without fault on his part, he cannot, while thus holding it as security, be held to account for it; but he is accountable for the net profits accruing before its destruction.[2] All the cases in regard to the hire or profits accruing out of chattels mortgaged relate to the hire of slaves, mortgaged prior to the abolition of slavery in the Southern States; but the doctrine established by the adjudicated cases are applicable to other property yielding an income to its owners. Thus, a mortgagee in possession of horses and the like is bound to exercise a reasonable diligence in keeping them engaged in useful employments so as to pay their necessary expenses, and to obtain a reasonable compensation for their use, &c. And it is no reasonable excuse for his failure to do so that he treated them with humanity, provided for their wants, &c., or that he managed them as they had been managed by the mortgagor;[3] he is

[1] Shaffer v. Chambers, 2 Halst. Ch. 548.

[2] Cornell v. De Groff, 31 Me. 104; Bennett v. Butterworth, 12 How. 367; Overton v. Bigelow, 10 Yerg. 48; Clark v. Robbins, 6 Dana, 349.

[3] Bennett v. Butterworth, 12 How. 367.

subject to the same responsibilities as a hirer; he must account for the hire, and at his own cost take care of the property.[1] If the property is in the hands of a receiver for the purpose of satisfying the mortgage debt, but the mortgagee is entitled to the hire or profits in payment of the debt,[2] it is held that after forfeiture the mortgagee is not liable or accountable;[3] but there is no sound reason for this rule if the mortgagee is in receipt of an income from the property, which is realized without divesting the mortgagor's title by an absolute sale in satisfaction of the mortgage debt; the mortgagor is entitled to have whatever amount may be realized applied in part or full payment of the debt secured; he has the right to apply the proceeds in this manner, and this right is not affected by a change of possession, but exists until foreclosure. Where the mortgagee appears to be acting in good faith in hiring out a chattel, and to have rendered a true account, he should be charged with the amount of the actual hire or income, to be applied to the extinguishment of the interest first, and then to the principal, and he must suffer the loss, if any incurred, by the insolvency of the parties hiring, and is not entitled to charge for his trouble in the management of the property.[4] If he chooses to take possession and manage the property, he must do it as a prudent owner would, so as to make it realize the utmost possible; he must take such care of the property as will be most advantageous to the owner and his own interest. If he meets with losses, he must sustain the burden, and cannot charge the mortgagor of the property with the

[1] Overton v. Bigelow, 10 Yerg, 48; Clark v. Dana, 6 Dana 349.

McCann v. Letcher, 8 B., Mon. 320.

[3] Turnbull v. Middleton, Walk. 413; Whittemore v. Parks, 3 Humph. 95.

[4] Clark v. Robbins, 6 Dana 349; Patton v. Harris, 15 B., Mon. 607.

results of his poor management. I do not apprehend that the doctrine here established will, under the present system of mortgaging, come into universal use. The necessity of a change of possession having been dispensed with by the registration laws, the rule above laid down will be applicable in those States where chattel mortgages are in the nature of an absolute sale, and a delivery of possession is necessary to protect the mortgagee's right.

§ 141. **Effect of Allowing the Mortgagor to Remain in Possession after Condition Broken.** —Possession of mortgaged property by the mortgagor, after default or condition broken, has been regarded as evidence of fraud, though capable of being rebutted by showing some sufficient reason why the possession is permitted to remain with the mortgagor.[1] In Illinois this rule is strictly adhered to, and no explanation is allowed; but a reasonable time after default to take possession is given the mortgagee, to be determined by the situation of the parties; four days after default has been regarded as showing a want of due diligence; and it was held that, as against third parties, the lien of the mortgage was lost;[2] and such is the rule in other places.[3]

[1] Magee v. Carpenter, 4 Ala. 469; Ravises v. Alston, 5 Ala. 297; Wiswal v. Ticknor, 6 Ala. 179; Desha v. Scales, 6 id. 356; Dearing v. Watkins, 16 id. 20; Beal v. Williamson, 14 id. 55; Simmerson v. Branch Bank, 12 id. 205; Bucklin v. Thompson, 1 J. J. Marsh. 223; North v. Crowell, 11 N. H. 251; Ryan v. Clayton, 3 Strobh. 413; Gardner v. Adams, 12 Wend. 297; Steele v. Adams, 21 Ala. 534; Hawkins v. Ingalls, 4 Blackf. 35; Watson v. Williams, 4 id. 26; Shurtleff v. Willard, 19 Pick. 202; Armstrong v. Baldock, Gow. 33; Reed v. Eames, 19 Ill. 594; Cass v. Perkins, 23 Ill. 382; Hanford v. Obrecht, 49 Ill. 146; Rhines v. Phelps, 8 Ill. 455.

[2] Wooley v. Fry, 30 Ill. 158; Reed v. Eames, 19 Ill. 591; Constant v. Matteson, 22 Ill. 546; Burnham v. Miller, 61 ib. 126; Leween v. Robinson, 59 Ill. 115.

[3] Travis v. McCormick, 1 Montana, 148.

But whether the possession does remain with the mortgagor is a question of fact to be determined by the jury from the evidence.[1] Thus, after the mortgagee has reduced it to possession upon default, and the title has become absolute in him (as is the case in Illinois), he may in good faith lend the property to the mortgagor, or employ him to look after it, just as he might with regard to any other property. Thus, where the property was an engine and boilers, it is a sufficient change of possession if the parties go upon the premises and make a formal delivery and acceptance of possession; that the mortgagee takes the keys, &c., of the engine, without which it cannot be run; that he intrusts them to a person he employs to take them to the mill and allow them to be used during working hours, and at night brings them to him; and also to look out for the mortgagee's interest, as absolute owner. But such change of possession to be sufficient must be *bona fide*, and not collusive to mislead the public. Where a mortgagee, after taking possession of the property, allows it to return into the possession of the mortgagor on a forthcoming bond, the mortgagor simply holds as bailee, the title remaining in the mortgagee.[2] This doctrine evidently conflicts with the rule that if an instrument is not fraudulent at the time of its execution, it cannot be made fraudulent by any subsequent matter;[3] and while a mortgagee of real estate may extend such indulgencies to his debtor as he may see fit until he is in danger of losing his remedy by reason of the operation of the statute of limitations, there is no reason why the latter

[1] Funk v. Staats, 24 Ill. 362, Planters' Bank v. Willis, 5 Ala. 770.

[2] Moody v. Haselden, 1 S. C. 129.

[3] Lambert's Case, Touch. 65; Weaver v. Joule, 3 C. B. N. S. 309; De Wolf v. Harris, 4 Mason 534; Head v. Ward, 1 J. J. Marsh. 280; Maples v. Maples, Rice Ch. 300; Gist v. Pressly, 2 Hill Ch. 318; Merrill v. Dawson, 1 Hemp. 563.

rule should be applied in cases where the security is personal property. A chattel mortgage is a security dependent upon statutory provisions. The rights of the creditor as against third persons are established by statute, and the duration of his lien as a prior one is also regulated by statute. In the absence of any statute, the doctrine that a mortgagee must take possession after default or breach of condition, that is, the maturity of the debt, is the only safe one. The question of notice to creditors cuts no figure in the case. The distinction between mortgages of real and personal property arises from the very nature of the property itself. In the one case, a mortgage of personal property, like a stock of groceries and provisions, or other property consumable in its use, or of ordinary merchandise, which is the subject of constant bargain and sale, and not readily distinguished from other like property, is not like a mortgage upon land, which is indestructible and unconsumable. In the one case, it may pass from hand to hand; in the other, it can not be removed; and while all courts are ready and willing to protect any creditor, no court will protect one who does not seek to protect himself, by pursuing his statutory right, and a mortgagee who will not avail himself of his security. Any creditor is justified in presuming that he no longer has security, and courts will act on this presumption. It may be a hardship in many cases to compel a mortgagee to deprive the mortgagor of his property, in case the latter is unable or refuses to pay; but it is equally hard and unjust to other creditors to allow a collusive security to hinder and delay them in the enforcement of their just debts; and whenever the rights of others intervene, the rule first stated should be rigidly adhered to.

§ 142. **When a Mortgagee will and will not Lose his Priority as against Purchasers and Others.**—A mortgagee, having a prior lien upon his debtor's property, may waive his priority in favor of an execution creditor or a subsequent mortgagee.[1] Where he consents to the sale of the property, or permits it to be levied on without asserting his claim, he is barred from claiming title to it as against the purchaser.[2] Especially where he receives the proceeds of the sale, his conduct implies an admission of title in the mortgagor, and an abandonment of any title in himself inconsistent therewith;[3] or, if he, by his statement to a third person that his mortgage was satisfied, or conceals the fact of his having a mortgage, induces such party to take a mortgage on the property, he cannot afterwards set up a claim to the mortgaged property, nor can his assignee with notice to the prejudice of the second mortgagee.[4] Where a mortgagee, not in possession, is present at a sale of the property, by the mortgagor, to another, and such mortgagee, on being asked to, fixes the price between the mortgagor and purchaser, but does not notify the purchaser of his mortgage, and the property is afterwards delivered to the purchaser, the mortgagee cannot recover the property as against such purchaser without notice;[5] but where a mortgage is properly filed or recorded, such record is notice to all the world of the mortgagee's rights, and though he drafted the second mortgage, or witnessed a subsequent conveyance, or

[1] Clason v. Shepherd, 6 Wis. 369.

[2] Grace v. Mercer, 10 B. Mon. 157.

[3] Beal v. Barclay, 10 B. Mon. 261.

[4] La Salle v. Barnett, 1 Black. 150; Chester v. Green, 5 Humph. 26; Platt v. Squire, 12 Met. 494; Thompson v. Sanborn, 11 N. H. 201.

[5] Brooks v. Record, 47 Ill. 30; Herman on Estoppel, chap. XIV.; Lloyd v. Lee, 45 Ill. 277; Kane v. Harrington, 50 Ill. 232.

stands by silently, while the property is sold under an inferior lien, unless he denies or fraudulently conceals his title, his lien will not be postponed or lost.[1] If a mortgagor makes a new and distinct contract with the mortgagee to deliver to him the mortgaged property, and also additional property, to be held as security for the payment of the debt which the mortgage was made to secure, and delivers them accordingly, and the mortgagee takes and holds possession of them under the new contract, he thereby becomes pawnee of all the property.[2] So, a mortgagee may, after forfeiture, waive the forfeiture, and thereby give the mortgagor a right to recover of him so much of the avails of the goods on a sale thereof as exceeded the amount due on the mortgage.[3] If the mortgagee claims title under a conveyance intended as a security, as if it were absolute, it is such a fraud as will generally prevent him from claiming as a *bona fide* mortgagee; a party will not be allowed to claim as owner and mortgagee; the positions are inconsistent with good faith.[4]

§ 143. **Rights of Parties where there are Successive Mortgages.**—There are cases where the same property is mortgaged to two or more creditors by the same instrument, and where there are separate mortgages upon the same property to several creditors, whose liens may or may not be equal. Their remedies may be several or joint, and it becomes necessary to

1 Steele v. Adams, 21 Ala. 543; Jones v. Twick, 33 Iowa, 246; Jackson v. Dubois, 4 Johns. 216; Brinkerhoff v. Lansing, 4 Johns. ch. 65; Clabaugh v. Byerly, 7 Gill. 354; James v. Morey, 2 Cow. 246; Patterson v. Esterling, 27 Ga. 205; White v. Phelps, 12 N. H. 382; Paine v. French, 4 Ohio 318; Canada v. Southwick, 16 Pick. 556.

2 Rowley v. Rice, 10 Met. 7.

3 Thompson v. Moore, 36 Me. 147.

4 Metropolitan Bank v. Godfrey, 23 Ill. 579.

ascertain their rights and the manner of enforcing them. Where a mortgage is given to secure separate debts, obligations, or duties, each mortgagee may enforce his rights in his own name. Such a mortgage is several, and not joint. Each has a right to enforce his claim under the mortgage in a form adapted to his own case.[1] If, by the mortgage, the whole property is forfeited by a single default, it is forfeited to the holders of the mortgage jointly, and they become tenants in common of the whole property. They will take, not by moities, but in proportion to their respective debts. Neither of the mortgagees, on his debt becoming due, acquires any such sole or separate ownership thereof as will authorize him to dispose of the property and appropriate the proceeds to his own use.[2] Thus, where A. gave to B. a mortgage of goods, providing that, if the mortgagor should attempt to sell them, B. might take immediate possession; simultaneously therewith the mortgagor delivered to three other parties, severally, three mortgages of the same property, each containing a clause that "this mortgage is of the same date, given at the same time, and to be recorded with the two others, all of which are alike in time, and neither is to have precedence of each other, but to be a like security to each," and each expressed to be subject to B.'s mortgage; the three subsequent mortgagees take their title as tenants in common, and may join in one action for the conversion of the goods.[3] The title which they take is the right of the mortgagor to redeem the property from the first mortgage, and they are estopped from contesting B.'s mortgage on the

[1] Burnett v. Pratt, 22 Pick. 556; Gibson v. Gibson, 2 Allen, 115.

[2] Donnels v. Edwards, 2 Pick. 617; Tyler v. Taylor, 8 Barb. 585.

[3] Wheeler v. Nichols, 32 Me. 333; Howard v. Chase, 104 Mass. 249.

ground of its not being recorded. The execution of their mortgage gives B. the right to take possession of the property and to maintain his possession as against them in the absence of any payment or tender of the amount due on his mortgage.[1]

In some of the New England States a statutory provision has been enacted forbidding a subsequent mortgage without a reference to the prior one, but an omission to comply with such statute will not render such subsequent mortgage void, because the statute is designed to secure the rights of the subsequent mortgagee, and the parties are not in *pari delicto*.[2] A second mortgage may be valid as against all persons, except the prior mortgagee and his assignees.[3]

§ 144. **Rights of Junior Mortgagees.**—The right of a junior mortgagee in regard to the enforcement of his lien is far from uniform. The lack of uniformity is the result of State laws governing transactions of this kind. The question of notice and the statutory requirements as to the form and validity, control his rights to a great extent. A junior mortgagee, where the prior mortgage is a valid one as against creditors and purchasers, takes subject to the lien of such mortgage. If a second mortgage is executed on the same property before the first mortgage is foreclosed, and such prior mortgage is discharged and extinguished, the junior mortgagee acquires all the rights of the first one.[4] Or, if he pay off the first mortgage for his own security,[5] he may satisfy such prior

1 Howard v. Chase, 104 Mass. 249.
2 Leach v. Kimball, 34 N. H. 564.
3 Smith v. Smith, 24 Me. 555.
4 Daly v. Proetz, 20 Minn. 41; Paine v. Waite, 11 Gray, 190; Paul v. Hayford, 23 Me. 234.
5 Weld v. Sabin, 20 N. H. 533.

mortgage to prevent his own lien from being cut off;[1] and his right to pay off the debt is not affected by an agreement by the parties to such prior mortgage for a higher rate of interest than that specified in the instrument.[2] Subsequent incumbrancers are supposed to have acquired their liens with reference to the existing ones of which they have had notice, and are, therefore, entitled to have payments applied, to reduce those liens, so far as they appear of record; and their rights cannot be prejudiced by private arrangements of parties, though such may be binding on the parties themselves. The giving of a new note secured by a second mortgage, which included a sum due for interest on the first note, operates as a payment of such interest, which inures to the benefit of a mesne incumbrancer.[3]

Where a senior mortgage is barred by the statute of limitations and the junior mortgage is made during such time, the mortgagor cannot afterwards endorse a revival upon the senior mortgage note so as to affect the previously acquired lien of the subsequent mortgage.[4] A prior mortgagee cannot enforce his mortgage, if overdue, against the assignee of a second mortgagee, who made the assignment when the first mortgage was overdue, and the mortgagor in possession, and without notice of the overdue mortgage, for this second mortgagee had a right to suppose the first mortgage was paid.[5] where there are several mortgages, all over due, and the mortgagor holds the property contrary to the conditions of them, any mortgagee who first takes possession of the property acquires a preference over the

[1] Smith v. Coalbaugh, 21 Wis. 127; Lucking v. Wesson, 25 Mich. 443.

[2] Gardner v. Emerson, 40 Ill. 296.

[3] Whittacre v. Fuller, 5 Minn. 508.

[4] Ladd v. Morris, 18 Cal. 482.

[5] Van Pelt v. Knight, 19 Ill. 535.

others, without regard to the date of the mortgage.[1] If a mortgagee make an arrangement to have the benefit of his mortgage inure to a third party, and such mortgage is satisfied, or if the property remains unapplied thereon, a junior mortgagee will have the right of possession against such third party.[2]

The holder of a subsequent mortgage cannot control the sale or disposal of the proceeds under the first mortgage unless he satisfies it,[3] but he may recover the property from any person except the first mortgagee, or parties claiming under him as assignee.[4] Where a subsequent mortgagee consents that the mortgagor may sell the property discharged from the lien of his mortgage, he does not warrant the title, nor estop himself from claiming the property under a subsequent assignment of the prior mortgage.[5]

§ 145. **Rights of Junior Mortgagees dependent on Notice.**—In those States where notice is one of the essentials of good faith, priorities among several mortgagees depend not only upon the actual date of the conveyances under which they hold, but also upon the knowledge, by a notice to them respectively, at the time of the conveyances, of the true state of facts and of the equities arising out of them.[6] A mortgagee who takes his mortgage with knowledge of a prior lien not recorded, will not be permitted, by placing his mortgage

1 Constant v. Matteson, 22 Ill. 546.

2 Hunt v. Daniels, 15 Iowa, 146.

3 Andrews v. Fiske, 101 Mass. 422: Meysenberg v. Schliefer, 46 Mo. 209.

4 Newman v. Tymeson, 13 Wis. 172; Gardner v. Morrison, 12 Ala. 547; Smith v. Smith, 24 Me. 555.

5 Clark v. Hale, 8 Gray, 187.

6 Lafarge, &c. v. Bell, 22 Barb. 54.

on file, to gain priority over the earlier lien.[1] Notice of a prior mortgage to a subsequent mortgagee or purchaser must be direct and positive or implied. A notice which is barely sufficient to put the party on inquiry is not enough, nor is a suspicion of notice sufficient.[2] It is competent to show by the mortgagor, that a subsequent mortgagee had notice of a prior unrecorded mortgage.[3] Priority of registration never prevails over a previous notice of an unregistered mortgage, whether prior or subsequent,[4] and a junior mortgagee, with notice of a prior unrecorded mortgage lien, gains no preference by having his mortgage recorded.[5] Where a second mortgagee has notice of a prior mortgage, the latter will have preference though not registered. But a *bona fide* assignee of the second mortgage, without notice, is not affected by the notice to his assignor.[6] Notice of, the existence of an unpaid prior mortgage destroys the preference of the subsequent mortgage, although such prior mortgage was neither recorded or possession delivered to such first mortgagee,[7] or if he has notice of such prior mortgage being improperly discharged, he takes no better title than his mortgagor.[8]

Where there are three mortgagees, of whom the first has lost his lien as against the third, by a failure to re-file within the year, and the second mortgagee has

[1] Mathews v. Everitt, 23 N. J. Eq. 473; Verges v. Prejean, 24 La. 78.

[2] Fort v. Burch, 6 Barb. 60; Jackson v. Van Valkenburgh, 8 Cow. 260.

[3] Van Wagenen v. Hopper, 4 Halst. Ch. 684.

[4] Berry v. Mutual Ins. Co., 2 Johns. Ch. 603; Sparks v. State Bank, 7 Blackf. 469; Woodworth v. Guzman, 1 Cal. 203.

[5] Neal v. Kerns, 4 Ga. 161.

[6] Jackson v. Van Valkenburgh, 8 Cow. 260.

[7] Gregory v. Thomas, 20 Wend. 17.

[8] Morgan v. Chamberlain, 26 Barb. 163.

taken his mortgage with actual notice of the prior one, and has preserved his priority of lien over the third mortgage, and the proceeds of the mortgaged property are insufficient to satisfy all the liens, distribution will be made in the following manner. To the third mortgagee, so much of the fund as would be applicable to his mortgage after satisfying the prior lien of the second; to the second, so much of the whole fund as would be applicable to his debt after satisfying the prior lien of the first, and without reference to the third; and to the first, the residue.[1] In Illinois, where a chattel mortgage is required to be acknowledged, a junior mortgagee of a properly executed chattel mortgage, will hold the property against a prior mortgage of which he had notice, if such prior mortgage is not properly acknowledged.[2] In other States, where the nature of the debt affects the validity, a mortgage made to secure a pre-existing debt, will be subject to the lien of a prior mortgage on the same property, although such subsequent mortgagee was without notice of the existence of the first mortgage,[3] and if such subsequent mortgagee has notice of an unsatisfied prior mortgage, then he is not a *bona fide* mortgagee.[4]

§ 146. **Right to Contest the Validity of Prior Mortgages.**—In order that a junior mortgagee may recover in an action against a person whose mortgage is void as to such subsequent mortgagee, there being neither record nor change of possession, he must show that his mortgage was made for a valuable consideration,

1 Day v. Munson, 14 Ohio S. 488.
2 Sage v. Browning, 51 Ill. 217.
3 Tiffany v. Warren, 37 Barb. 571; Boyd v. Beck, 29 Ala. 703.
4 Day v. Munson, 14 Ohio S. 488; Paine v. Mason, 7 Ohio S. 198.

or the payment of an honest debt.[1] A mortgagee is not estopped by a judgment in action between the mortgagor and a prior mortgagee, rendered after the execution of the second mortgage from contesting the amount due upon the property mortgaged.[2] Thus, where A. mortgaged property to B. by an indenture which stated that the property was subject to a prior mortgage to C., A. afterwards sold the property to D. Held, in an action by B. against D., that B. was not estopped to show that the property was never mortgaged to C., and that if it had been so mortgaged to C., and the title had become absolute in him by breach of condition of the mortgage, yet the jury would be warranted, by proof that C. afterwards received payment of the mortgage debt, to find that he had waived his right to hold the property.[3]

§ 147. **Right of Junior Mortgagee to Redeem.** —A party taking a subsequent mortgage upon personal property, takes a mortgage upon the mortgagor's interest or title. In order to obtain a prior right to the satisfaction of his claim out of the property pledged, he must redeem it from any prior lien with which it may be incumbered. He is not compelled to redeem as soon as he obtains his lien, but may redeem at any time during the existence of such prior lien, and, until his right to redeem is foreclosed by a sale of the property in satisfaction of the prior liens, his right to redeem continues, whether the mortgagor is in default or not.[4] His rights are the same after default as before, and the prior mortgagee occupies the position of a secured or preferred creditor, having a prior lien which is entitled to a prior

[1] Baskin v. Shannon, 3 N. Y. 310.
[2] Campbell v. Hall, 16 N. Y. 575.
[3] Barry v. Bennett, 7 Met. 354.
[4] Treat v. Gilmore, 49 Me. 34; Van Brunt v. Walkalee, 11 Mich. 177; Landers v. George, 49 Ind. 309.

satisfaction out of the proceeds realized. A court, in marshalling securities for the purpose of protecting a subsequent mortgagee, will take care that no injustice is done to him who has the prior security.[1] A subsequent mortgagee of property, part of which is embraced in a prior mortgage, may, after exhausting all his other securities without obtaining satisfaction, file a bill in equity against the prior mortgagee for the purpose of subjecting such property, by compelling him to resort first to the other property embraced in the mortgage,[2] in accordance with the rule that where a party has a resort to two funds for the payment of his debt, he cannot so employ them as to injure a subsequent creditor who can resort to but one of them. A junior mortgagee may maintain a bill against the holder of a senior mortgage to redeem and compel an assignment of the senior mortgage, after a tender of the amount due thereon, and demanding an assignment, where the satisfaction of the senior mortgage would not be as beneficial as an assignment thereof.[3] Where proceedings to foreclose chattel mortgages are brought, subsequent mortgagees have the right to become parties and have their rights adjudicated.[4] Where a prior mortgage is made to secure a void claim, and the same property is mortgaged to another person to secure a just debt, and the subsequent mortgagee pays the amount of the void claim to the first mortgagee, he cannot recover of such prior mortgagee the money so paid.[5]

1 Butler v. Elliott, 15 Conn. 187.
2 Hannah v. Carrington, 18 Ark. 85.
3 Pardee v. Van Anken, 3 Barb. 534.
4 Parrott vs. Hughes, 10 Iowa 459.
5 Ellsworth v. Mitchell, 31 Me. 247.

§ 148. **When a Junior Mortgagee will not be Liable to a Prior One.**—If a subsequent mortgage is expressed to be subject to a prior mortgage without any stipulation that the mortgagee shall pay it, the mortgagor is primarily liable for any deficiency,[1] the property being the primary fund for the purpose of satisfying the claims against it. One taking a mortgage subject to a prior one, takes it with such lien upon it.

But, if by any mistake, or under a false impression as to the respective rights of parties, but without fraud on his part, a junior mortgagee takes possession and sells the mortgaged property with the consent of the prior mortgagee, such mortgagee will not be liable for a conversion of the property, while he would be to a judgment in an action for money had and received.[2] Nothing but actual fraud can divest the prior mortgagee, whose mortgage is recorded, of his security,[3] and a sale by a junior mortgagee, under such circumstances above stated, will not deprive him of his prior right to satisfaction out of the property.

[1] Binse v. Paige, 1 Abb. N. Y. App. Dec. 138; Belmont v. Coman, 22 N. Y. 438.

[2] Anderson v. Case, 28 Wis. 505

[3] Johnson v. Stagg, 2 Johns. 510.

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2 Hannah v. Carrington, 18 Ark. 85.
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[1] Binse v. Paige, 1 Abb. N. Y. App. Dec. 138; Belmont v. Coman, 22 N. Y. 438.

[2] Anderson v. Case, 28 Wis. 505

[3] Johnson v. Stagg, 2 Johns. 510.

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1 Butler v. Elliott, 15 Conn. 187.
2 Hannah v. Carrington, 18 Ark. 85.
3 Pardee v. Van Anken, 3 Barb. 534.
4 Parrott vs. Hughes, 10 Iow
5 Ellsworth v. Mitchell, 31 I

§ 148. **When a Junior Mortgagee [illegible] Liable to a Prior One.**—If a [illegible] expressed to be subject to a prior [illegible] any stipulation that the mortgagee [illegible] mortgagor is primarily liable for any [illegible] property being the primary [illegible] satisfying the claims against it. [illegible] subject to a prior one, takes [illegible]

But, if by any mistake, or [illegible] to the respective rights of parties [illegible] his part, a junior mortgagee takes [illegible] the mortgaged property with the [illegible] mortgagee, such mortgagee will not be [illegible] version of the property, while he would [illegible] in an action for money had and received[1] [illegible] actual fraud can divest the prior [illegible] mortgage is recorded, of his security[2] [illegible] junior mortgagee, under such [illegible] stated, will not deprive him of his [illegible] satisfaction out of the property.

[1] [illegible] v. Paige, 1 Abb. N. Y. App. Dec. 138; Belmont v. Coman, 22 N. Y. [illegible]

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ignorance of the lien, and, after the maturity of the mortgage, the creditor extends indulgences to the mortgagor who is solvent at the time his mortgage matures, but subsequently becomes insolvent, the purchaser will be protected.[1] It is held that the legal title to a chattel is in the first mortgagee, against which, at law, a purchaser, without notice, for a valuable consideration, cannot be protected; nor will the circumstances of his purchase be worth anything as a matter of defense, except on a question of fraudulent conveyance.[2] This is on the principle that the execution of a mortgage vests the title in the mortgagee, subject to defeasance, but is not the rule in equity, and is contrary to the decisions in other cases.

§ 152. **Rights of Purchaser when he Takes Subject to a Mortgage.**—We have seen the effect of notice to a purchaser, and where notice subjects him to the lien of a mortgage. Whenever a mortgage is duly recorded, if otherwise valid, or possession of the mortgaged property is delivered to the mortgagee, a purchaser with actual notice of it will take subject to the rights and lien of the mortgagee. The record of such mortgage is notice to him, and the law presumes he purchased the interest of the mortgagor in the property[3] and it makes no difference if it is defective as against a purchaser without notice. If it is valid between the parties to it, it is to him.[4] Such a purchaser is not one without notice, and he only acquires the

1 Cleckly v. Hull, 30 Ga. 838.

2 Youngblood v. Keadle, 1 Strobh. 121.

3 Curtis v. McDougal, 26 Ohio State, 66; Kruse v. Scripps, 11 Ill. 98.

4 Patten v. Moore, 32 N. H. 382; Hathorn v. Lewis, 22 Ill. 395; Gregory v. Thomas, 20 Wend. 17; Lewis v. Palmer, 28 N. Y. 271; Hill v. Beebe, 13 N. Y. 565; Sanger v. Eastwood, 19 Wend. 515

mortgagor's right of redemption, and, therefore, he cannot raise the objection that it had ceased by its own limitation and had not been legally renewed. To entitle a purchaser of property of choses in action to the protection of a court of equity, as against the legal title of a prior equity, he must not only be a purchaser without notice, but also for a consideration actually paid; he must actually have parted with some value or some right upon the faith of the purchase, receiving of the property as a security for, or in payment of, a precedent debt, when no security was surrendered, or anything of value parted with, is not a purchase for a valuable consideration.[1] The vendee of a mortgagor has only the rights of his vendor. All persons coming in under the mortgagor stand, by substitution, in his place, and are equally affected by the contract, whether notified of its existence or not.[2] The mortgagee in possession is not a naked depositary, but his possession is coupled with an interest, and is damaged by an unlawful conversion of the property to the extent of that interest, and he can recover for such conversion against the mortgagor or his vendee.[3] The mortgagee may compel him either to restore or redeem the property.[3] The vendee has no right to have the mortgage debt charged upon the mortgagor personally, instead of charging it upon the mortgaged property.[4] Nor can he avail himself of the defense of

[1] Cary v White, 52 N. Y. 138.
[2] Abbott v. Goodwin, 21 Me. 407.
[3] McCandless v. Moore, 50 Mo. 511.
[3] Almy v. Wilbur, 2 W. & M. 371; Fowler v. Merrill, 11 How. 375.
[4] Cherry v. Monro, 2 Barb. Ch. 618; Michael v. Her Husband, 1 La. Ann. 174.

usury in the mortgage,[1] and if he assumes payment of the debt, becomes personally liable therefor.[2] If he consumes or sells part of the property, so that what remains does not produce sufficient to satisfy the mortgage debt, he may be held personally liable for the deficiency; this even where he takes in hostility to the mortgage, denying that it is an existing lien.[3] The mortgagee may not only recover the property, but where the property is not to be had, its value, and between different purchasers equity will enforce contribution.[4] But where land is mortgaged, and also a mortgage of personal property to secure the same debt, and the mortgagee seizes the chattels after condition broken, a subsequent purchaser of the land from the mortgagor has an equity to compel the mortgagee to apply the value of the personal property seized to the mortgage debt, or prove its loss without fault or legal responsibility on his part;[5] and in a case where there is a mortgage of land, and also an assignment of personal property to the same person, and the personal property is sold by the mortgagor, if the land does not realize enough to pay the debt, the personal property is still subject to the lien of the mortgagee as against such purchaser.[6] Where a mortgagor remains in possession and sells a portion of the mortgaged property, such sale

[1] Stein v. Indianapolis, &c., 18 Ind. 237; Sellers v. Bottsford, 11 Mich. 59; Perry v. Kearns, 13 Iowa 174; Cramer v. Lepper, 26 Ohio S. 59; Ohio, &c. R. R. Co. v. Kasson, 37 N. Y. 218; Bullard v. Raynor, 30 N. Y. 206; Chamberlain v. Dempsey, 36 N. Y. 149; Post v. Dart, 8 Paige 639; Given v. Kemp, 13 Mass. 315; Reading v. Weston, 7 Conn. 413; De Wolf v. Johnson, 10 Wheat. 367; Freeman v. Auld, 44 N. Y. 50.

[2] Schlatre v. Greand, 19 La. 125.

[3] Beers v. Waterbury, 8 Bosw. 396; Duke v. Strickland, 43 Ind. 494.

[4] Hughes v. Graves, 1 Litt. 317; Duke v. Strickland, 43 Ind. 494.

[5] Moody v. Haselden, 1 S. C. 129.

[6] McLean v. Lafayette Bank, 4 McLean 430.

is void in the New England States, unless the mortgagor has authority to sell, either express or implied, from the mortgagee.[1] Where a debtor gives a mortgage to his creditor of certain personal property, and such creditor afterwards takes from him another mortgage on the same and other property, extending the time of payment and securing other creditors, the acceptance of the last mortgage creates an implied contract not to proceed on the first mortgage, and therefore the possession held by the purchaser of property purchased at a sale under the first mortgage is not adverse, so as to render a sale under the second mortgage void on account of an adverse possession. The title acquired by the purchaser is subordinate to the last mortgage.[2] A purchaser subject to a mortgage cannot affect the amount of the mortgage in the hands of an assignee by showing that it was assigned for a less amount than was secured by it, and where, in such a case, the subsequent purchaser gives further security for the forbearance of the assignee, the former mortgage is not void for usury, but the assignee will be obliged to credit all such additions.[3] A *bona fide* purchaser of a chattel at a mortgagee's sale, under a mortgage executed and filed in a State where the mortgagor resides, and where the property is at the time of its execution, and the mortgage being due, will be protected against a previous *bona fide* purchaser from the mortgagor who has carried the mortgaged property into another State and there sold it.[4]

[1] Jenckes v. Goffe, 1 R. I. 511.
[2] Billingsly v. Harrell, 11 Ala. 775.
[3] Lovett v. Dimond, 4 Edw. Ch. 22.
[4] Parr v. Brady, 37 N. J. L. 201.

§ 153. **When a Purchaser will take the Property Free from the Lien of a Mortgage and be Protected in His Purchase.**—Where a mortgage is defectively recorded, it is fatal to its validity as to purchasers. Thus, where a mortgage was dated Nov. 29, 1854, but by mistake was recorded as dated March 29, 1854, and the property was sold to a third party July 16, 1855, and thereupon attached by the mortgagee, it was held that if the mortgage, properly recorded, would have been valid to defeat or incumber the purchaser's title, yet the mistake was fatal to its validity.[1] Where a mortgage is made and recorded in a county other than that wherein the mortgagor resides, it is invalid, and a purchaser from the mortgagor will be protected. Thus, where a mortgage of a horse was made and recorded in one county, and the mortgagor took the horse to his residence in another county and there sold him, the mortgagee brought an action against the purchaser for the horse, it was held that the mortgage was not properly recorded, and, therefore, that the purchaser, being without notice, was not liable.[2] Where a purchaser of a mortgaged chattel pays a portion of the consideration of the sale to the mortgagee upon an understanding that he should relinquish all claim on the chattel, and look to the mortgagor for the balance due on the mortgage, although the mortgagee gives no formal discharge, he cannot afterwards enforce the mortgage against the purchaser of the chattel.[3] A purchaser may establish his title as against the mortgagee to such of the mortgaged property as he buys, by proving a verbal license from him to the mortgagor to sell it, although the mortgage contains a provision prohibiting a sale

[1] Stedman v. Perkins, 42 Me. 130.
[2] Vaugh v. Bell, 9 B. Mon. 477.
[3] Rickerson v. Raeder, 4 Abb. N.Y. App. Dec. 610.

thereof without the written assent of the mortgagee.[1] So, where a former unexpired mortgage is left on record undischarged, and it is afterwards fraudulently foreclosed, a *bona fide* purchaser under the foreclosure will hold the property against an existing mortgage.[2] Where a mortgagee brings suit on the note, and to foreclose a mortgage, and a judgment is rendered on the note but not on the mortgage, a subsequent *bona fide* purchaser of the mortgaged property will obtain a valid title.[3] Lapse of time will also be sufficient to protect a purchaser's title, as where a mortgagee acquiesces in a sale made by a mortgagor.[4] A purchaser of the mortgaged property will not be affected by an agreement made between the parties to the mortgage for the payment of a higher rate of interest than that specified in the mortgage after he becomes vested with the mortgagor's interest;[5] and where a mortgagor who sells the mortgaged property takes in payment a non-negotiable note made payable to the order of his wife, and at the time of the sale there is a valid mortgage on the property which the purchaser pays off and discharges, such purchaser may set off the amount so paid in satisfaction of the mortgage in an action on the note.[6]

§ 154. **Rights of a Purchaser at an Execution Sale of the Mortgagor's Interest.**—A mortgage is a lien against a purchaser of the property under an execution,[7] and a purchaser will take it subject to

[1] Shearer v. Babson, 1 Allen 486.
[2] Atwater v. Seymour, Brayt. 209.
[3] Johnson v. Murphy, 17 Tex. 216.
[4] Waller v. Tate, 4 B. Mon. 529.
[5] Bassett v. McDonald, 13 Wis. 444.
[6] Lane v. Romer, 2 Chand. 61.
[7] Feiberger v. Craighead, 4 Dall. 151; Porter v. Parmly, 52 N. Y. 184.

the mortgage;[1] but an unrecorded mortgage constitutes no lien against an execution creditor without actual notice, however binding on the parties.[2] One who, at an execution sale, for a valuable consideration, purchases chattels without notice of an unrecorded mortgage thereof, executed after the contraction of the mortgage debt, is entitled to protection as a subsequent purchaser without notice. The two classes of persons at execution sales, protected from undisclosed mortgages by the recording acts, are, first, subsequent creditors without notice of the mortgage; second, purchasers for a valuable consideration without such notice. It is immaterial whether one who purchases for the satisfaction of debts contracted with a subsequent creditor without notice, had notice or not. The recording acts are to be construed consistently with the rule of equity, that a purchaser with notice from a purchaser without notice is protected equally with his vendor, the latter on his own merit and by immediate title, the former on the merit of his particular vendor, and as the indispensable means of his security. If the mortgage is recorded after a levy upon the mortgaged property it will not defeat the title under such levy,[3] and this, whether the levy is on *mesne* or final process; thus, in trespass for property, the defendant claimed under a chattel mortgage, which had been filed, there was no evidence as to the residence of the mortgagor when it was executed; the mortgage was held void as to the plaintiff, a subsequent

1 Porter v. Parmly, 52 N. Y. 185; Bank v. Crary, 1 Barb. 542; Manning v. Monnahan, 1 Bosw. 459; Same case, 28 N. Y. 585.

2 Stephenson v. Browning, 48 Ill. 78; Gaff v. Harding, 48 Ill. 148; McKnight v. Gordon, 13 Rich. Eq. 222.

3 Stow v. Meserve, 13 N. H. 46; Work v. Harper, 24 Miss. 517; Pond v. Skidmore, 40 Conn. 213; Hulings v. Guthrie, 4 Penn. 123; Davidson v. Beard, 2 Hawks. 520.

purchaser on execution of the same property, for want of proof that it was filed in the proper office.[1]

Where property is sold by an officer, as subject to a mortgage, the purchaser cannot deny the validity of the mortgage.[2] But where an announcement is made upon an auction sale of personal property that it is sold subject to a chattel mortgage, with the conditions of which a purchaser must comply, it does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage.[3] The mere fact of a sale and conveyance of property subject to an outstanding mortgage, creates no personal liability on the part of the purchaser to pay the mortgage. When the officer making such sale delivers possession of the mortgaged property to the purchaser, his possession is not adverse to the mortgagee. All the interest the purchaser can obtain, where the mortgage is valid, is that of the mortgagor, and he, being substituted for the mortgagor, holds under and subject to the lien of the mortgage.[4] Between such purchaser and the mortgagee, in an action involving simply the title to the mortgaged property, no proof of consideration other than that recited in the instrument itself is necessary.[5] While a purchaser takes subject to a mortgage where he buys the mortgagor's interest in the property, if he purchase the property afterwards at another execution sale, where it is sold regardless of the mortgage, he is not estopped in an action of replevin brought by the mortgagee from showing that the mortgage was fraudu-

[1] Smith v. Jenks, 1 Denio, 580.
[2] Porter v. Parmly, 52 N. Y. 185; Horton v. Davis, 26 N. Y. 497.
[3] Hamill v. Gillespie, 48 N. Y. 556.
[4] Williams v. Hatch, 38 Ala. 388.
[5] Webb v. Mann, 3 Mich. 139.

lent.[1] Any execution creditor asserting a lien upon mortgaged chattels may impeach the mortgage,[2] and a purchaser at an execution sale has all the rights of the creditor as to remedies,[3] and has the same right to impeach a mortgage that the creditor would have. But a title under a mortgage recorded after the rendition of a judgment against the mortgagor, is better than a title under an execution issued on such judgment after the registration of such mortgage, if the mortgage be valid.[4]

§ 155. **Mortgages to Indemnify Sureties. Rights of Sureties and of Creditors.**—Where a creditor obtains a mortgage or other security from the principal debtor, a surety is entitled to its protection. If the surety has obtained indemnity from his principal, the creditor may avail himself of it, and have satisfaction of his debt out of it.[5] A surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed against the principal debtor.[6] If the indemnity is against a contingent liability, there can be no substi-

1 Dedman v. Bridges, 9 B. Mon. 474.

2 Dix v. Van Wyck, 2 Hill, 522; Mason v. Lord, 40 N. Y. 488; Berdan v. Sedgwick, 44 N. Y. 626; Dort v. Bank, &c., 8 Paige. 639; Jackson v. Tuttle, 9 Cow. 233; Thompson v. Van Vechten, 27 N. Y. 568; Merchants, &c. Bank v. Commission, &c., 49 N. Y. 636.

3 Sands v. Hildreth, 14 Johns. 493; Dedman v. Bridges, 9 B. Mon. 474.

4 Troy v. Smith, 33 Ala. 469.

5 Osborne v. Noble, 46 Miss. 449; Bowen v. Hoskins, 45 Miss. 183.

6 Lewis v. Palmer, 28 N. Y. 271; Clason v. Morris, 10 Johns. 524; Wilkes v. Harper, 2 Barb. Ch. 338; Matthews v. Aiken, 1 N. Y. 595; Hodgson v. Shaw, 3 M. & K. 183; Hayes v. Ward, 4 John. Ch. 130; Norton v. Coons, 3 Den. 190; Craythorne v. Swinburne, 14 Ves. 159; Bullock v. Boyd, Hoff. Ch. 294; Edson v. Dillaye, 17 N. Y. 158; Eddy v. Travers, 9 Paige, 521; Birdenbecker v. Lowell, 32 Barb. 9; Goodyear v. Watson, 14 Barb. 481; Curtis v. Tyler, 9 Paige, 432; Chester v. Kingston Bank, 17 Barb. 271.

tution until the liability has become absolute.[1] Thus, a mortgage made to an indorser of a note for the maker's accommodation, to secure him against liability, is not an accessory to the principal obligation, but simply a personal indemnity depending upon the payment of the note by the indorser. The indorser in such a case will have no right of action until he has paid the money on his indorsement, and the holder of the note, after judgment against the indorser, can claim no better right under the mortgage than the indorser possesses. Until the indorser pays the money, he can maintain no action for money paid.[2] If the indorser is discharged by the *laches* of the creditor, he cannot claim the benefit of the mortgage.[3] Where the contract is for the personal benefit of the surety, in opposition to the idea of pledge for the debt, or providing means for its payment, the creditor can claim only such rights and remedies as the surety had. If he has not been damnified, and the conditions of the mortgage or other contract of indemnity are unbroken, the surety himself can assert no remedy, nor can a creditor, claiming through him and in his stead, have substitution;[4] but where the security is for the debt, as well as the ultimate protection of the surety, it inures to the creditor; and it is of no moment whether it was given at the time the principal obligation was incurred, or afterward, or whether it was known at the time to the creditor or not. The

[1] Osborne v. Noble, 46 Miss. 449; Bank of Va. v. Boiseau, 12 Leigh. 370; Hopewell v. Bank, &c., 10 Leigh. 206; Hall v. Cushman, 16 N. H. 462.

[2] Morrison v. Berkey, 7 S. & R. 238; Miller v. Howry, 3 Pa. 380; Gardner v. Cleveland, 9 Pick. 337; Hall v. Cushman, 16 N. H. 462; Hodges v. Armstrong, 3 Dev. L. 253; Shepard v. Shepard, 6 Conn. 37; Francis v. Porter, 7 Ind. 213; Bowman v. McElroy, 15 La. 466; Osborne v. Noble, 46 Miss. 449; Bush v. Stamps, 26 Miss. 463; Bibb v. Martin, 22 Miss. 87.

[3] Tilford v. James, 7 B. Mon. 336.

[4] Ohio Life Ins. Co. v. Reeder, 18 Ohio, 35; Osborne v. Noble, 46 Miss. 449.

creditor has an interest in it—becomes a *cestui que trust;* the fund or property at once assumes a trust character, and the surety can do no act which will discharge the trust or release the property from the burden to the prejudice of the creditor.[1] A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and the surety holds the mortgaged property, subject to such trust and lien, even after the holder's claim on him to pay the note is barred by the statute of limitations, and though the property, as between mortgagor and mortgagee, has become absolute in the mortgagee. The trust created by such mortgage is not secret, and when the mortgage is recorded, it gives constructive notice of the trust to all creditors and purchasers, so that they cannot, by seizure or grant of the mortgaged property, take it discharged of the trust.[2]

Property mortgaged to secure notes indorsed by the mortgagee for the accommodation of the mortgagor, will be applied, in equity, upon the insolvency of both the maker and indorser, to the payment of

1 Osborne v. Hulet, 26 Vt. 308; Eastman v. Foster, 8 Met. 19; Collins v. Roberts, 3 Gratt. 363; Moses v. Murgatroyd, 1 Johns. Ch. 119; Horner v. Savings Bank, 7 Conn. 487; Daniel v. Joyner, 3 Ired. Eq. 913; Ross v. Wilson, 15 Miss. 766; Dick v. Maury, 17 Miss. 496; Wright v. Morley, 11 Ves. 12; Maine v. Harrison, 1 Eq. Cas. B. 93; Osborne v. Noble, 46 Miss. 449; Phillips v. Thompson, 2 Johns. Ch. 418; Pratt v. Adams, 7 Paige, 617; Curtis v. Tyler, 9 Paige, 43; Ten Eyck v. Holmes, 3 Sand. 428; Roberts v. Colvin, 3 Gratt. 359; Toulmin v. Hamilton, 7 Ala. 362; Ohio, etc. Co. v. Ledyard, 8 Ohio, 866; Riddle v. Bowman, 27 N. H. 236; Haven v. Foley, 19 Mo. 632; Aldrich v. Martin, 4 R. I. 520; Troy v. Smith, 33 Ala. 469; Moore v. Moberly, 7 B. Mon. 299; Cullum v. Branch Bank, etc., 23 Ala. 797.

2 Eastman v. Foster, 8 Met. 19; Stewart v. Preston, 1 Branch. 10

those holding such notes.[1] Where two mortgages upon the same property were executed with the knowledge of both the mortgagees at the same time for their equal security as creditors and accommodation indorsers of the mortgagor, and both were put upon record within an hour of their execution, though one reached the register a few minutes earlier than the other, and subsequently the mortgagor assigned the property subject to the mortgages, *held*, that, after deducting the expenses of the sale, the proceeds should be distributed to the mortgagees, in proportion to the amount of debts due and liabilities incurred by each of the mortgagees, without reference to whether they were prior or subsequent accommodation indorsers upon the same paper, and that, to satisfy the equities of the holders of the indorsed paper upon the property mortgaged, for their security as well as for the security of the assigned estate, the proceeds should be distributed, as far as outstanding accommodation paper indorsed by the mortgagees[2] was concerned, to the holders of the paper, and not to the mortgagees. Where a mortgage is given not to secure a debt but to indemnify a surety, there the security does not, in the first instance, attach to the debt as an incident to it; but whatever equity may arise in favor of the creditor, with regard to the security, arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt. Until the equity arises, the surety has a right in equity, as well as law, to release the security. And the equity of the creditor not being an inherent one, growing out of the contract, but resulting merely from a state of facts which entitles him to equitable relief, and becoming fixed

[1] Rice v. Dewey, 13 Gray, 47; Dick v. Turley, 1 S. & M. Ch. 557.

[2] Aldrich v. Martin, 4 R. I. 520.

only by the interposition of a court of equity, the relief cannot be furnished, even though insolvency has intervened, unless the security is still retained by the surety at the time of the application of the creditor for relief.[1]

§ 156. Where a mortgage is given for a debt, which is also further secured by the obligation of a surety, the surety, if compelled to pay the debt to the creditor, is entitled to be subrogated to all of his rights and remedies against the mortgaged property, and the mortgagee cannot relinquish the mortgage security without discharging and releasing the surety.[2] Sureties who have paid the debt of their principal, and who hold a mortgage upon a chattel to indemnify them, which provides that, if the debt is not paid at maturity by the mortgagor, the sureties shall have possession of the property, may recover possession thereof.[3] Payment of the debt divests the mortgagor of his interest in the property mortgaged.[4] Where a party is so related to the mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose; and in such case no assignment of the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it.[5]

1 Jones v. Quinnipack Bank, 29 Conn. 25.

2 Mathews v. Aikin, 1 N. Y.; Root v. Bancroft, 10 Met. 46; Hays v. Ward, 4 John. Ch. 123; Norton v. Coon, 3 Den. 130; Gossim v. Brown, 11 Pa. 527; McDermott v. Bank, etc., 9 Humph. 123; Root v. Stow, 13 Met. 5; Becket v. Snow, 1 Cush. 510; Orvil v. Newell, 17 Conn. 97; Brewer v. Staples, 3 Sand. Ch. 579; McLean v. Towle, 3 Sand. Ch. 117; King v. McVicar, 3 Sand. Ch. 192; Swan v. Patterson, 7 Md. 164; Copis v. Middleton, 1 T. & R. 231; Hodgson v. Shaw, 3 My. & K. 195; Williams v. Owen, 13 Sim. 597; Higgins v. Frankis, 10 Jur. 328; Copel v. Butler, 2 Sim. & S. 457.

3 Mills v. Malott, 43 Ind. 248.

4 Swift v. Hart, 12 Barb. 530.

5 Walker v. King, 44 Vt. 601; O'Hara v. Haas, 56 Miss. 374.

Whether a mortgagor who executes a mortgage to secure the fulfillment of an obligation of a third person intends to bind himself personally, is a question of intention, to be determined by a just and reasonable construction of the whole instrument; and the insertion in a mortgage, executed to secure a debt due by a third person, of a clause by which the mortgagor "confesses judgment for the amount of the debt, and agrees, in case of its non-payment, that the law in such cases made and provided may be strictly enforced and summarily put in execution," is not evidence that the mortgagor intended to bind himself personally for the payment of the debt, but the clause is inserted merely to give the remedy by executory process against the hypothecated property without the issuing of an execution against other property of the mortgagor,[1] where the condition of a mortgage is that if the mortgagor, the endorser of a note, should cause it to be paid, the mortgage should be void; this does not increase his liability on the note, nor waive his right to have the maker sued.[2] Where a surety pays the debt and takes a new mortgage of the same property to secure him the repayment of the money paid by him, this is a waiver of all rights acquired under the first mortgage.[3]

A mortgage to secure the mortgagee from all liability that he may incur by reason of his becoming surety or indorser on the notes of the mortgagor, does not secure other notes which are evidence of money loaned the mortgagor by the mortgagee, the mortgage is security for the debt or debts therein specified,

[1] New Orleans, &c., Co. v. Hagan, 1 La. Ann. 62.

[2] Carlisle v. Chambers, 4 Bush. 268.

[3] Paul v. Hayford, 23 Me. 234.

and no other.[1] But a clause in a mortgage given as a security to an accommodation indorser for the payment of certain notes therein named, providing that the mortgagor would indemnify the mortgagee from all damages, costs, etc., which he had incurred, or might incur, or become in any way liable for, on account, or by reason, of the use of his name, as indorser or otherwise, for the mortgagor's accommodation or benefit, applies to and covers other similar notes outstanding at the date of the mortgage, although not specified therein, on the ground that such a provision would otherwise be mere unmeaning surplusage, and that any other construction would violate the fundamental rule, that effect must be given to every clause and part of an instrument if possible;[2] so where A., being a creditor of B., is also surety for him in several debts, some separately and others jointly with other persons, B. executed to him a mortgage conditioned to pay all the debts due to A., and all others in which A. was liable as surety for B.; *held*, that A. held the mortgage as security for all such debts, and that on a sale of the mortgaged property, the fund should be distributed *pro rata* among them all, including the debt of A.[3] Where A. is surety on a note, and the maker executes a mortgage to indemnify him "from all losses by reason of his liability as surety," and the note is placed in a bank for collection, but at maturity is only partially paid, and a new note for the remainder is given, with A. as indorser, which is discounted by the bank in order to pay the first note, the maker afterwards becomes insolvent, and all his property is sold, including that mortgaged; A., as indorser, has a right, in equity, to have the proceeds of the sale applied in payment of

1 Clark v. Oman, 15 Gray, 521.
2 Ripley v. Larmouth, 56 Barb. 21.
3 Moore v. Moberly, 7 B. Mon. 299.

the new note, although he had not been called upon to pay it, the new note being but a continuation of that one secured by the mortgage, and he is entitled to preference over subsequent mortgagees.[1]

A mortgage, to secure and indemnify a surety, is a lien from its execution, and not merely from the time the mortgagee pays the debt on which he is surety, and will take precedence of a conveyance or judgment made and obtained subsequent to such execution and prior to the payment of the debt,[2] nor is such mortgage fraudulent, as to other creditors, on its face, because it confers on the mortgagee a power of sale at his own discretion to pay the liabilities at any time, nor because the mortgage, being general in its description, excepts from its operation certain judgment liens, and all property exempt from execution;[3] so, where it is made to several to secure them against their liabilities as indorsers of the mortgagor, it is not invalidated by the fact that no two of the mortgagees are liable upon any one paper.[4] But where a chattel was mortgaged, and, while it was still in the mortgagor's possession, the mortgagee's partner became surety for the mortgagor upon an agreement that the chattel might afterwards stand as security for his indemnity, and the mortgagee afterwards took possession of the chattel, the liability for which his partner had become bound was paid out of the partnership funds. The mortgage having been declared void for fraud, it was held that the mortgagee had no right to retain the chattel for the indemnity of himself and partner.[5] But

[1] Markell v. Eicheberger, 12 Md. 78.
[2] Watson v. Dickens, 20 Miss. 608.
[3] Walthall v. Rives, 34 Ala. 91.
[4] Wheeler v. Nichols, 32 Me. 233.
[5] Beeman v. Lawson, 37 Me. 543.

where a surety, who has a mortgage to indemnify him, joins with his principal in prosecuting a writ of error on a judgment on the debt for which he is surety, he does not thereby invalidate the mortgage.[1] But where certain articles, after possession taken by the mortgagee, after default in payment, are redelivered to the mortgagor, who enters into an agreement to sell them and pay over the proceeds to the mortgagee, and a party becomes surety on such agreement in an action on the agreement the surety pleaded that the original mortgage had been assigned to him by the mortgagee, it was held that the new agreement was a substitute for the mortgage, the mortgagee having surrendered, for the personal security, his lien on the goods.[2]

§ 157. **Release of Surety.**—A creditor will not be allowed to enforce a debt when he has acted in such a manner as to deprive the party against whom he seeks to enforce it of any means of indemnity to which he is legitimately entitled. Thus, if the creditor vitiate any of the securities taken for the debt, by fraud or usury, at the time when they are taken;[3] or if, by positive misfeasance or gross negligence, he renders it unavailable afterwards,[4] he will be precluded from a recovery against the surety to the full extent of the injury sustained by the latter. Hence, a creditor who allows a fund to pass from his hands, under circumstances which make it a duty to keep or receive it in payment of a debt to which it is primarily liable, will be precluded

1 Stover v. Herrington, 7 Ala. 142.
2 Harper v. Neff, 6 McLean, 390.
3 Hayes v. Ward, 4 Johns. Ch. 123.
4 Capel v. Butler, 2 S. & S. 457; Mure *in re*, 1 Coxe, 63; Baker v. Briggs, 8 Pick. 122; Farmers' Bank v. Reynolds, 13 Ohio, 84; Baker v. Fordyce, 9 Penn. 275; Curran v. Colbert, 3 Ga. 239.

from proceeding against those whose liability for the debt is secondary, and who would consequently have been discharged from all further obligation had the fund been appropriated to its legitimate purposes.[1] Thus, any loss arising by a failure to record any mortgage, bill of sale or other instrument in writing given as a security for a debt, by which its lien is lost, or it is rendered in other respects unavailable, is thrown upon him whose negligence has occasioned it.[2] A mortgage, given by a principal debtor to his sureties to protect them against suretyship, is discharged by the creditors discharging the sureties.[3] Thus, the maker of a promissory note gave a mortgage to his sureties upon the note to secure them against their suretyship, and they assigned the mortgage to the payee of the note for his security, taking from him a discharge under seal of their liability on the note; *held*, that the payee had no rights under the mortgage.

§ 158. **Of the rights of Creditors under Attachments and Executions. Priorities. New England Practice, etc.**—In treating of the rights of creditors of a mortgagor, we shall commence by an examination of the principles applicable to creditors under a mortgage. It is a well-settled principle of law, that

[1] Ramsey v. Westmoreland Bank, 2 Penn. 253; Jones v. Myrick, 8 Gratt. 179; Baker v. Briggs, 8 Pick. 122; Lichtenthaler v. Thompson, 13 S. & R. 157.

[2] Collingwood v. Irwin, 3 Watts. 306; Muirhead v. Kirkpatrick, 21 Penn. 237; Slevins v. Morrow, 4 Ind. 425; Russell v. Hester, 10 Ala. 536; Capel v. Butler, 2 S. & S. 457; Watson v. Allcock, 19 Eng. L. & Eq. 64; Teaff v. Ross, 1 Ohio, S. 469; Harker v. Conrad, 12 S. & R. 301; Toomer v. Dickerson, 37 Ga. 428; Hampton v. Levy, 1 McCord Ch. 107; Long v. Brevard, 3 Strobh. Eq. 59; Newton v. Chorlton, 10 Hare, 630; Strange v. Fooks, 4 Giff. 412; Whiting v. Burke, L. R., 10 Eq. 539; Wullf v. Jay, L. R., 7 Q. B. 756.

[3] Sumner v. Bachelder, 30 Me. 35; Bonham v. Galloway, 13 Ill. 68.

as long as a debtor owns and has absolute dominion over his property, he may dispose of it to one of his creditors, or to all of them, provided it is done in good faith, without intent to hinder, delay or defraud his creditors; and therefore a mortgage given to a creditor for a valuable consideration will be protected, if the statutory requirements are complied with, so as to give it precedence over the claims of others. A debtor may, in a mortgage, stipulate as to which one of several notes secured by the instrument shall be entitled to priority of payment; so he may give a preference in a mortgage to one creditor over another, and designate which of the debts provided for shall be paid out of the mortgaged property;[1] such a mortgage will not be void. It is a well-settled principle of law in regard to assignments, and there is no reason why it is not equally applicable in cases of mortgages. A creditor of an insolvent debtor, or one having assumed liabilities for him as surety, may lawfully take from him a mortgage to secure such debt, or save him harmless from such liability, and, as the reward of such diligence, will be protected in the priority thus obtained.[2] But where a creditor attempts to extend the lien beyond the necessity for his own indemnity, and secure the debt of any other creditor, such mortgage is in substance and legal effect an assignment in trust, and such mortgagee will be deemed a trustee, holding the mortgaged property for the benefit of all the creditors of the mortgagor.[3] But a person

1 Robinson v. Collier, 11 B. Mon. 332.

2 Bloom v. Noggle, 4 Ohio S. 45; Doremus v. O'Hara, 1 Ohio S. 45; Atkinson v. Tomlinson, 1 Ohio S. 237; Solomon v. Sparks, 27 Ga. 385.

3 Brown v. Webb, 20 Ohio, 389; Bloom v. Noggle, 4 Ohio S. 45; Wilcox v. Kellogg, 11 Ohio, 394; Bates v. Coe, 10 Conn. 293; Perry v. Holden, 22 Pick. 269; Henshaw v. Sumner, 23 Pick. 446; Low v. Wyman, 8 N. H. 537; Meredith Co. v. Smith, 8 N. H. 34; Baker v. Hall, 13 N. H. 298; Goodrich v. Downs, 6 Hill. 438; Lang v. Lee, 3 Rand. 410.

holding a note for the price of property sold for the purpose of defrauding creditors, and secured by mortgage upon the property sold, cannot enforce his mortgage to the prejudice of creditors whose rights accrued before the fraudulent sale and execution of the note.[1] But the rights of a *bona fide* creditor who takes a mortgage on goods purchased on fraudulent representations, without notice of the fraud of the debtor, are not affected by a subsequent information thereof.[2]

§ 159. **Of the Rights of Creditors who Cause the Mortgaged Property to be Attached.**—A mortgage being a security for a debt, a mortgagee, until the mortgagor's title is divested, occupies the position of a creditor, secured by an incumbrance upon the property of his debtor, and, therefore, the interest of the mortgagor or debtor is liable to seizure on attachment. A creditor may not only attach the mortgaged property, but he may contest the validity of the mortgage and show that, as to him, it was not valid by reason of a failure to record it as required by statute,[3] and may impeach it for fraud.

§ 160. **Practice in the Case of Attachments in the New England States.**—In almost all of the New England States personal property mortgaged is made liable to attachment by any creditor of the mortgagor, and held as unincumbered, provided the attaching creditor shall pay to the mortgagee, within a time specified, the amount for which such property is mortgaged, and the mortgagee must demand in writing the

[1] Bowman v. McKleroy, 14 La. 587.
[2] Krauert v. Simon, 65 Ill. 344.
[3] Angier v. Ash, 26 N. H. 99; Farmers' L. & T. Co. v. Hendrickson, 25 Barb. 484.

amount due, from the officer making the attachment. The purpose of the written demand required of the mortgagee is to give the officer or attaching creditor notice of the existence of the claim, and such information as to its nature and amount as will enable him to act understandingly in reference to it. If it is sufficiently explicit and accurate to answer these purposes, it is not rendered invalid by mere informalities. If made in good faith, it will not be defeated by inaccuracies or other defects which do not tend to mislead, or by which the parties in the particular case could not be damnified.[1] The demand must substantially and correctly state the nature and amount of the mortgagee's claim. No slight or immaterial misstatement will defeat it.[2] It is not necessary for the mortgagee, in his written demand, to designate the articles included in his mortgage so as to distinguish them from others of a like character with which they might be commingled. It is sufficient for him to point them out, or cause it to be done, when called upon by the officer to do so for the purpose of separation.[3] Such demand may state the full amount without deducting what the mortgagor might deduct for usurious interest.[4] The mortgagee must give a just and true account of the amount due, and if there are several demands, a statement of the aggregate of the several demands is not a just and true account.[5] But if the particular items are

1 Rowley v. Rice, 10 Met. 7; Witham v. Butterfield, 6 Cush. 217; Brewster v. Bailey, 10 Gray, 37; Folsom v. Clemence, 111 Mass. 273.

2 Harding v. Coburn, 2 Met. 333; Gassett v. Sanborn, 8 Gray, 218; Belknap v. Wendell, 21 N. H. 175; Melvin v. Fellows, 33 N. H. 401; Gilmore v. Gale, 33 N. H. 410; Page v. Ordway, 40 N. H. 253; R. I. Bank v. Danforth, 14 Gray, 123.

3 Morrill v. Keyes, 14 Allen, 222; Folsom v. Clemence, 111 Mass. 273; Codman v. Freeman, 6 Cush. 306.

4 Brewster v. Bailey, 10 Gray, 37.

5 Johnson v. Sumner, 1 Met. 172.

not asked for, a statement of the aggregate amount is sufficient.[1] Where there are two mortgages by the debtor to the same creditor of different articles to secure different demands, and all the property covered by both mortgages is attached, a sufficient statement and demand as to one mortgage will avail *pro tanto*, although it be insufficient as to the other.[2] Where the mortgage is made to two persons to secure a gross sum to each, it is sufficient if the account set forth the gross sum due to each.[3] It will be no objection to the validity of a demand that it is signed by the attorney, or that it states a claim of title under a pledge as well as a mortgage.[4] A demand by a mortgagee upon an officer attaching the property as that of the mortgagor, which describes the mortgage and states the sum due thereon, stating that he will hold the attaching creditor responsible for all damages sustained by the detention of the property, is sufficient to sustain an action of replevin for the property or an action for damages.[5]

An account without stating the amount due is insufficient.[6] So a statement that the property is held to secure the payment of the mortgagor's note for a specified sum,[7] and a reference to the town records for a description of the property, was held insufficient.[8] The demand must not only state the amount, describe the property, but it must demand payment, and may be made by an infant mortgagee.[9] The fact that the property is mortgaged to secure the mortgagee against future liabilities, or for the performance of some col-

[1] Hills v. Farrington, 6 Allen, 80.
[2] Simonds v. Parker, 3 Met. 144.
[3] Housatonic Bank v. Martin, 1 Met. 294.
[4] Pettis v. Kellogg, 7 Cush. 456.
[5] Molineux v. Coburn, 6 Gray, 124.
[6] Page v. Ordway, 40 N. H. 253.
[7] Sprague v. Branch, 3 Cush. 575
[8] Moriarty v. Lovejoy, 23 Pick. 321.
[9] Bradford v. French, 110 Mass. 365.

lateral act, cannot excuse him from making the demand as required by statute;[1] nor the fact that the mortgage contains a stipulation that, if the property is attached by any other creditor, it shall be lawful for the mortgagee to take immediate possession of the mortgaged property, does not take the case out of the statute, which provides that the mortgagee shall not maintain an action to recover possession unless he makes the required statement and demands payment.[2] It is held that where a United States marshal attaches the property the statute is inapplicable.[3] In accordance with the rule that a mortgagor has no title after executing a mortgage on his property, it is held, under the practice in the New England States, that a junior mortgagee, having no right to the possession of the property as against a prior mortgagee, cannot maintain an action against an attaching officer for conversion of the property; that, as he has only a right of redemption, no other right vests in him under the subsequent mortgage, as under the following state of facts: J. made a mortgage to V. and B., and a second mortgage of the same property to R. J. remained in possession of the mortgaged propety until the same was attached by the defendant, as marshal, and put into the custody of a keeper, at the suit of a creditor of J. The second mortgagee made a demand in writing of the officer, pursuant to the statutes relating to the attachment of personal property under mortgage, and on the next day the first mortgagees made a similar demand. Within ten days after the last demand, it was agreed between the first mortgagees and the attaching creditor that the

1 Haskell v. Gordon, 3 Met. 268.

2 Hunt v. Williams, 106 Mass. 114; Wing v. Bishop, 9 Gray, 223.

3 Howe v. Freeman, 14 Gray, 566.

officer should remove a portion of the property and the keeper; that the mortgagees should take immediate possession and dispose of the residue under their mortgage and apply the proceeds to the payment of their debt; and that the attaching creditor should pay whatever balance might remain of the mortgagee's claim not satisfied out of the property. Pursuant to this agreement the officer removed a portion of the property, which he afterwards sold on the execution in favor of the attaching creditor, and the first mortgagees took possession of the residue of the property and proceeded to dispose of the same, with the written consent of the mortgagor and second mortgagee. The proceeds of the mortgaged property not being sufficient to pay the debt of the first mortgagees, the balance was paid by the attaching creditor, and the mortgagees made an assignment to him of their mortgage. In an action of trover commenced prior to the assignment of the first mortgage by the second mortgagee against the officer, to recover the value of the property taken by him and sold on execution, it was held that, at the time of the plaintiff's demand on the defendant, and when he commenced his action of trover, he had only a right to redeem as second mortgagee, but not the right of possession, and therefore that the action could not be maintained.[1] So a person having a mortgage or lien upon personal property cannot, after its attachment by the creditor, sell part of the property and apply the proceeds towards the satisfaction of the mortgage or lien, and then demand of the attaching officer payment of the balance.[2]

[1] Rugg v. Barnes, 2 Cush. 591.

[2] Granger v. Kellogg, 8 Gray, 490.

§ 161. The time in which to make such demand and statement is a reasonable time; and what will be deemed reasonable, will depend, in a great degree, upon the circumstances peculiar to each case; and for adjudications upon the question of what is reasonable time, see cases cited[1] Where a demand was not made for ten months after a seizure, and no cause shown for delay, held not within a reasonable time, and deprived the mortgagee of his right of action against the officer.[2]

Where the mortgagee makes demand on the attaching officer to pay the mortgage debt, and the officer does not make payment in twenty-four hours, the mortgagee becomes entitled to immediate possession, and may maintain an action of trover against the officer.[3] A demand is necessary before the mortgagee can maintain his action against the officer.[4] But where there is no valid attachment, no demand is necessary before bringing suit.[5] In Maine, suit may be brought without demand;[6] or, if the property is intermingled with other, after levy, the action may be brought without specifying the property in the demand.[7] But where an officer has attached the property on two suits in favor of different plaintiffs against the mortgagor, if the mortgagee's demand for payment was expressly limited to one attachment, he cannot maintain an action against the officer.[8] Where the mortgagor dies, and his administrator obtains possession

1 Tapley v. Butterfield, 1 Met. 515; Johnson v. Sumner, 1 Met. 172; Legate v. Potter, 1 Met. 325; Housatonic Bank v. Martin, 1 Met. 294.

2 Brackett v. Bullard, 12 Met. 308.

3 Alden v. Lincoln, 13 Met. 204.

4 Wing v. Bishop, 9 Gray, 223; Haskell v. Gordon, 3 Met. 268; Moriarty v. Lovejoy, 23 Pick. 321; Miller v. Baker, 20 Pick. 285; Codman v. Freeman, 3 Cush. 306.

5 Jordan v. Farnsworth, 15 Gray, 517.

6 Cutter v. Copeland, 18 Me. 127; Putnam v. Cushing, 10 Gray, 334.

7 Averill v. Irish, 1 Gray, 254.

8 Macomber v. Baker, 3 Allen, 241.

of the property, the mortgagee is entitled to and may maintain an action, after demand, against the administrator, without paying the attaching officer's fees paid by him.[1] But when mortgaged property is attached, and the attaching officer makes a demand of the mortgagee for an account, and no account is rendered within fifteen days; or if one is rendered, and it is a false one, the officer may, in such case, hold the property discharged from such mortgage lien, and the property may be again attached by such officer, at any time before the expiration of such fifteen days, so long as he holds the property under the original attachment under which the demand was made, and no other or further demand need be made by such officer while holding said property in case of a subsequent attachment.[2] While in Maine, where a valid mortgage is made and duly recorded, an officer is not authorized to make a seizure of the same on *mesne* process as the property of the mortgagor without first paying or tendering the full amount of the debt due secured by the mortgage.[3] Where a mortgage is delivered for record, but a request made to keep it out of sight for a few days, and the request is complied with, or a mortgage is made and filed without the knowledge of the mortgagee, the levy of an attachment on the property will be preferred, if made before notice is received by the mortgagee.[4]

§ 162. An actual notice to a creditor of an unrecorded mortgage of the personal property of his debtor does not debar him from taking such property by attachment or execution. But if any notice will debar

[1] Parsons v. Merrill, 5 Met. 356.
[2] Kimball v. Morrison, 40 N. H. 117.
[3] Smith v. Smith, 24 Me. 555.
[4] Welch v. Sackett, 12 Wis. 243; Low v. Pettingill, 12 N. H. 337.

him, it must be notice that is full, clear and explicit, so as to designate the specific property bound by the mortgage, by marks and numbers or other description capable of identifying it, especially when it is left in the possession of the mortgagor. The notice must express the sum for which the property is bound, and must give substantially the same information as would be given by an inspection of the mortgage deed.[1] A creditor cannot insist that a mortgage is void because not registered, unless the ground is alleged, and the defendant has the right to reply notice to creditors;[2] while in New York, the fact that the creditor had notice of the existence of an unregistered mortgage, will not prevent him from availing himself of the objection that the mortgage was not recorded at the time.[3] An attaching creditor cannot defeat a mortgagee's title by showing that the mortgaged property was purchased with money fraudulently reserved by the mortgagor from his creditors in the settlement of his estate as an insolvent.[4] After the attachment of the mortgagor's interest, his release of his equity of redemption to the mortgagee, before judgment is rendered in the attachment suit, will not prevent the attaching officer from recovering the value of the mortgagor's interest as seized by him.[5]

1 Denny v. Lincoln, 13 Met. 200.

2 Allen v. Montgomery, etc. Co., 11 Ala. 437.

3 Farmers' L. & T. Co. v. Hendrickson, 25 Barb. 484.

4 Codman v. Freeman, 3 Cush. 306.

5 Wentworth v. Leonard, 4 Cush. 414.

# CHAPTER XVI.

## PAYMENT, SATISFACTION AND DISCHARGE.

WHEN PAYABLE.—DEBT PAYABLE IN INSTALLMENTS.—PAYMENTS, HOW CREDITED.—PART PAYMENT. — PRIORITIES.—WHAT WILL DISCHARGE OR RELEASE A MORTGAGE.—WHEN PAYMENT WILL BE PRESUMED.—WHEN THE SECURITY BUT NOT THE DEBT WILL BE RELEASED.— WHEN THE MORTGAGE WILL BE EXTINGUISHED.—EFFECT OF PAYMENT OF THE MORTGAGE DEBT.—WHEN SATISFIED MORTGAGES CANNOT BE REVIVED.—WHAT WILL NOT DISCHARGE A MORTGAGE.—INTENTION OF PARTIES AS TO SATISFACTION.—WHEN IT WILL CONTROL.

§ 163. **When Payable.**—One of the most important events in regard to a valid mortgage in which not only the parties to the instrument are concerned, but creditors and purchasers also, is that of its payment and discharge. A mortgage given to secure one or more notes is payable whenever the notes mature; the security, however, may become available for the satisfaction of the mortgage, prior to the maturity of the notes, by a breach of some one of the conditions therein, as stated in a preceding chapter. Where a debt secured by a mortgage is payable on demand, it is due immediately, and the mortgagee may commence proceedings at once to recover the property, without any previous demand; the commencement of proceedings is a sufficient demand.[1] Where no particular time is specified for the payment of a sum secured by mortgage, it will

[1] Gillett v. Balcolm, 6 Barb. 370.

be held to be payable in a reasonable time, and if payment is not made within such time, the mortgagee may foreclose.[1] If the time for payment is fixed and specified in the mortgage, the mortgagor is not entitled to any other notice.[2] It is held by some courts that where there is a mistake made in the time at which a mortgage is payable, parol evidence is inadmissible to vary the legal result, to show that the parties at the time of its execution agreed upon a time of payment different from that expressed in the mortgage, as where a mortgage is given in 1876, payable in 1870, it becomes payable immediately.[3] The time of payment limited in a mortgage of personal property, although under seal, may be extended by parol, and the condition saved until the expiration of the extended time;[4] and where there are two notes payable at different times, an agreement to extend the mortgage fifteen or twenty days gives an extension of time of payment of each note for the term of twenty days beyond the time they respectively become payable, and no further.[5] A delay of the mortgagee to enforce payment of his debt, is not fraudulent so as to render his mortgage void.[6] Under a mortgage to secure two notes, one overdue and one not due, with condition to pay when payment should be demanded, it was held that an extension of credit was implied from the contract, and that the mortgagee had no right of possession until demand was made.[7] Where a note is given, payable at a certain time, with a fixed rate of interest, and at the same time a mortgage is

1 Farrell v. Bean, 10 Md. 217.

2 Ing v. Cromwell, 4 Md. 31.

3 Fuller v. Acker, 1 Hill. 473; Martin v. Rapelye, 3 Ed. Ch. 229.

4 Flanders v. Barstow, 18 Me. 357; Acker v. Bender, 33 Ala. 230;

5 Flanders v. Barstow, 18 Me. 357.

6 Davis v. Evans, 5 Ired. 525.

7 Carpenter v. Town, Hill. & D. 72; Ely v. Carnley, 19 N. Y. 496.

given to secure the payment of such note, in which mortgage there is a stipulation that the interest shall be paid quarterly, semi-annually or annually, the note and mortgage must be construed together as parts of one contract, and so construed, the interest is payable at the times specified in the mortgage.[1] Registered mortgages must be paid off according to the dates of their registry.[2]

§ 164. **Mortgages Made to Secure Several Notes, or one Note Payable in Installments.**— Where a mortgage is made to secure the payment of promissory notes falling due at different dates, and the property upon which the security is taken is not sold till the maturity of all the notes, the proceeds are to be applied to their payment in the order in which they fall due;[3] in the absence of special equities,[4] such notes are like so many successive mortgages—the first one due has priority in the order in which they mature, and this, whether all remain in the hands of the mortgagee or some have been assigned,[5] and the fact that the holder of a note, payable at a time later than the rest, has taken an assignment of the mortgage, does not operate to give his note a prior right to satisfaction.[6] While in equity, the simple fact of one note falling due before the others, will not of itself give it a preference over the rest, where the mortgaged property is insufficient to pay the whole.[7] The maker of a note which

[1] Muzzy v. Knight, 8 Kans. 576.

[2] Den v. Roberts, 1 South, 515; Grant v. Bissett, 1 Caines Cas. 112.

[3] Mitchell v. Ladue, 36 Mo. 526.

[4] Harris v. Harlan, 14 Ind. 439; Marine Bank v. International Bank, 9 Wis. 57; Murdock v. Ford, 17 Ind. 52; U. S. Bank v. Covert, 13 Ohio, 240.

[5] Wood v. Trask, 7 Wis. 566; U. S. Bank v. Covert, 13 Ohio, 240; Murdock v. Ford, 17 Ind. 52; Harris v. Harlan, 14 Ind. 439.

[6] Wilson v. Hayward, 6 Fla. 171.

[7] Cooper v. Ullman, Walk. Ch. 251.

is payable by installments at a future time certain, with interest, is entitled to grace, both on the principal and interest, and the conditions of the mortgage given to secure the payment of the same sums and interest at the same times, are not broken until the expiration of the grace which is allowed upon the note.[1] In the absence of demand, or anything equivalent to demand, the mortgagor is entitled to the whole of the business day of the last day of grace to pay the note, and is not in default till then.[2]

§ 165. **Mortgages Payable in Installments.**— Mortgages, when the amount secured is somewhat larger than the mortgagor is able to pay at one time, are, for his benefit and convenience, often made payable in several installments, or at several different periods, as in three, six, nine and twelve months, or semi-annually, and where the principal is not made payable at such times, the interest may be, so that there may be a default by the mortgagor in the payment of interest, if not in the principal debt, secured. In a case of this kind, where there is a provision in the mortgage that, in default of payment of interest or of the principal, the whole sum shall become due and payable, the non-payment of either principal or interest by the mortgagor is such a breach of condition or forfeiture as will give the mortgagee the right to an immediate possession of the property, and makes the whole sum due and payable at once, and the mortgagee's rights become as perfect, upon default, in the payment of one installment of interest or principal as, upon default, in the payment

[1] Coffin v. Loring, 5 Allen, 153. [2] Daley v. Proetz, 20 Minn. 411.

of the whole debt.[1] The mortgagor may prevent any action on the part of the mortgagee by paying the installment which has become due,[2] provided the mortgagee is willing to accept such payment. A provision that if default should be made in the payment of interest, and ten days thereafter the principal, with the arrears of interest, should, at the option of the mortgagee, become due immediately, is valid.[3] Where a mortgage provides that, on the happening of certain contingencies, the notes secured by it, though not due by their terms, should become due and payable, and that the mortgagee may elect to take possession of the property, the mortgagee is not compelled to take possession in order to preserve his lien, but has the election either to treat the notes as due, or let them stand on their original terms, as he may desire, and where the conditions of the mortgage are broken, on default in payment of one of the notes, it is optional to take possession on the first default or to await the maturity of the last note.[4] Where the whole sum is to become due upon default,

1 Ferris v. Ferris, 28 Barb. 29; Hunt v. Harding, 11 Ind. 245; First Nat. Bank v. Peck, 8 Kans. 660; Halsted v. Swartz, 1 Thomp. & C. 559; Ottawa, etc. Co. v. Murray, 15 Ill. 336; Eastabrook v. Moulton, 9 Mass. 258; Robinson v. Loomis, 51 Pa. 78; Valentine v. Van Waggoner, 37 Barb. 60; Rubens v. Prindle, 44 Barb. 336; Grattan v. Wiggins, 23 Cal. 16; Jones v. Lawrence, 18 Ga. 277; Cecil v. Dynes, 2 Ind. 266; Adams v. Essex, 1 Bibb. 149; Solomons v. Claggett, 3 Bland, 125; Magruder v. Eggleston, 41 Miss. 284; Baker v. Lehman, Wright (O.), 522; Smart v. McKay, 16 Ind. 45; Morgenstein v. Klees, 30 Ill. 422; Sowarby v. Russell, 6 Rob. N. Y. 322; Harper v. Ely, 56 Ill. 179; Malcolm v. Allen, 49 N. Y. 448; Hosie v. Gray, 71 Penn. 198; Jones v. Schulmeyer, 39 Ind. 119; Bennett v. Stevenson, 53 N. Y. 508.

2 Salmon v. Claggett, 3 Bland, 125; Caufman v. Sayre, 2 B. Mon. 202; Baker v. Lehman, Wright (O.), 522; Ferris v. Ferris, 28 Barb. 29; Grattan v. Wiggins, 23 Cal. 16; Eastabrook v. Moulton, 9 Mass. 258; Morgenstein v. Klees, 30 Ill. 422.

3 Reubens v. Prindle, 44 Barb. 336; Robinson v. Loomis, 51 Pa. 78; Valentine v. Van Waggoner, 37 Barb. 60; Schoonmaker v. Taylor, 14 Wis. 313; Basse v. Gallagher, 7 Wis. 442.

4 Barbour v. White, 37 Ill. 164.

at the option or election of the mortgagee, the mortgagee must exercise his option and give notice to the mortgagor before he commences suit for the whole sum.[1] Where the mortgagee has made his election in accordance with the stipulation, he cannot be compelled to accept the interest and waive the stipulation; nor does he waive his right to elect by receiving the installment of principal.[2]

§ 166. **Part Payment. How Credited.**—Payment of part of a mortgage debt is a satisfaction and release *pro tanto*, and parol proof of such release is admissible.[3] Where a mortgagee has converted stock or other things mortgaged, the debt is canceled only to the extent of the value of the property;[4] and where there are entries on the mortgage of sundry levies and sales made on execution issued prior to bringing an action on the mortgage note, such levies are a satisfaction *pro tanto* of the mortgage debt, and, if not accounted for, must be credited on the note.[5] Indorsements of payments made upon promissory notes, whether of interest or principal, constitute, when made upon the note itself, no part of the note, but are to be considered the same as receipts, executed by the holder to the maker of the note for the sums received, and parol evidence is admissible to explain them, or even to show that they were erroneously placed upon the note.[6] Where a mortgage was conditioned to pay a certain amount, with interest, in fourteen equal annual installments upon a certain

1 Basse v. Gallagher, 7 Wis. 444; Marine Bank v. International Bank, 9 Wis. 57.

2 Malcolm v. Allen, 49 N. Y. 448.

3 Howard v. Gresham, 27 Ga. 347.

4 Davis v. Rider, 5 Mich. 423.

5 Earnest v. Napier, 19 Ga. 537.

6 McDaniels v. Lapham, 21 Vt. 222.

day in each year, it was sought to be canceled on the ground of full payment, or tender of payment; *held*, that the mortgagor was bound to pay the sum in fourteen equal installments, on the day specified in each year, as it became due; that where partial payments are made on obligations, after the money has become due, the day on which the money was to become due by the installment is not to be regarded in computing interest, but the rests are to be made when the money is actually paid, unless the payment is less than the interest due, in which case the rest is to be made when the first payment, with the prior payments, will amount to the interest due at the time payment is made, and that, in case of overpayment, the excess is to be applied to the principal and interest computed on the balance of the principal.[1] A contract by the mortgagee to accept from the mortgagor a quantity of property at a stated price sufficient to pay the note, will not destroy the legal effect of a mortgage as a security therefor.[2] Thus, a mortgage on lumber and logs, which provides that the lumber mortgaged, and that which shall be manufactured from the logs, shall be delivered to the mortgagee and received by him at a price which he has previously paid the mortgagor for such lumber, and that the value thereof shall be applied on the mortgage debt, is not fraudulent in law, and the amount furnished will be credited in payment.[3]

§ 167. **Discharge and Satisfaction of a Mortgage.**—When a mortgage is executed, the debt intended to be secured by it, is to be considered the principal, and the securities are considered the adjuncts,

[1] French v. Kennedy, 7 Barb. 452.
[2] Lehman v. Marshall, 47 Ala. 362.
[3] Johnson v. Curtis, 42 Barb. 588.

depending for their existence on the existence of the debt. The consequence is, that when the debt is discharged, the securities, liens and charges created by them are extinguished, and from that time have no existence, so that whatever extinguishes the mortgage debt extinguishes the mortgage,[1] as the release of the debt. A receipt in full of the mortgage debt by the mortgagee is an equitable release of the mortgage.[2] An acknowledgment upon the back of a mortgage that the condition thereof has been complied with, and that all the obligations therein have been discharged, under the hand and seal of the mortgagee, is a discharge of the mortgage.[3] A tender to one of two joint mortgagees, and a satisfaction of the mortgage by him, will discharge the lien.[4]

§ 168. **What will Release or Satisfy a Mortgage.**—Nothing but payment of the mortgage debt, or its release, will operate as a discharge.[5] A payment of the debt from the funds of the mortgagor extinguishes it.[6] Such payment, whether made after default or before maturity, discharges it.[7] The mere extension of time of payment of the mortgage note will not effect the mortgagee's security as to subsequent incumbrances,[8] provided the statutory requirements are com-

1 Packard v. Kingman, 11 Iowa, 219; Sherman v. Sherman, 3 Ind. 337; Jackson v. Stackhouse, 1 Cow. 122; Crosby v. Chase, 17 Me. 369.

2 Marriott v. Handy, 8 Gill. 31.

3 Allard v. Lane, 18 Me. 9.

4 Donnelly v. Simonton, 7 Minn. 167.

5 Parkhurst v. Cummings, 56 Me. 155; Folsom v. Lockwood, 6 Minn. 186; McNair v. Picotte, 33 Mo. 57; Whittacre v. Fuller, 5 Minn. 508; Crosby v. Chase, 17 Me. 369; Heard v. Evans, 1 Free. Ch. 79; Ladd v. Wiggin, 35 N. H. 421.

6 Hatfield v. Reynolds, 34 Barb. 612; Perkins v. Dibble, 10 Ohio, 433; Kinley v. Hill, 4 W. & S. 426; Perkins v. Sterne, 23 Tex. 561.

7 Johnson v. Sherman, 15 Cal. 287; Dutton v. Warschauer, 21 Cal. 609; Leighton v. Shapley, 8 N. H. 359.

8 Folsom v. Lockwood, 6 Minn. 186; Whittacre v. Fuller, 5 Minn. 508; McNair v. Picotte, 33 Mo. 57.

plied with, or the subsequent mortgages are taken during the validity and life of the prior one. Payment by the mortgagor to the mortgagee of the mortgage debt extinguishes a mortgage, even in the hands of an assignee, for a valuable consideration, who neglects to give notice of the assignment before payment;[1] and a payment made by the mortgagor to one of two trustees, to whom a mortgage is assigned, discharges the debt.[2] A chattel mortgage is extinguished by payment, made with the mortgagor's money, by a purchaser, at a sheriff's sale, who acted in collusion with the mortgagor to defraud his creditor. Such a purchaser cannot keep the mortgage alive against subsisting liens, even for payments made to protect his title.[3] A decree enforcing a mortgage is a destruction or satisfaction of it; the lesser security is merged by the decree into a higher one;[4] and a release of the judgment will satisfy the mortgage.[5] If a mortgagee, after default in payment by the mortgagor, but before he has taken any proceeding under the mortgage, takes a new note payable at a later day than the first, and a new mortgage on the same property, with an understanding and agreement between himself and the mortgagor that the new note and mortgage shall be a payment and satisfaction of the first note and mortgage, the first note and security is thereby extinguished and discharged.[6]

1 Hogdon v. Naglee, 5 W. & S. 217; Johnson v. Carpenter, 7 Minn. 176.

2 Bowes v. Seeger, 8 W. & S. 222.

3 Thompson v. Van Vechten, 27 N. Y. 568.

4 Manigault v. Deas, 1 Baily Ch. 283.

5 Perkins v. Pitt, 11 Mass. 25.

6 Daly v. Proetz, 20 Minn. 411.

§ 169. **Performance of the Conditions will Discharge a Mortgage.**—If a mortgage is given to secure the delivery of goods on a certain day, which are not delivered until after that day, and are then accepted, the lien of the mortgage is thereby discharged.[1] So if a mortgage is given to a surety to secure him against liability for indorsing a note of the mortgagor, and the note is paid, and the surety relieved from any liability, the mortgage will be discharged.[2] So a voluntary giving up and satisfying a mortgage, and taking the note of a third party in lieu thereof, is a relinquishment of the mortgage lien, and a surrender of the mortgage.[3] So a sale under a judgment for the debt secured by a mortgage will discharge the lien of such mortgage;[4] and the performance of the conditions of a mortgage will defeat the title of the mortgagee.[5]

§ 170. **When a Mortgage will be Released, but not the Debt.**—A mortgage is satisfied by the extinguishment of the debt secured by it; but not if the personal liability of the mortgagor be released without intending to extinguish the debt.[6] The mere entering of a discharge of a mortgage by the mortgagee does not, of itself, discharge the debt, but the security only.[7] A mortgagee may, for reasons which are known to himself, or by arrangement with the mortgagor, in order to enable him to procure credit, agree to release the mortgage, relying upon the ability of the

1 Butler v. Tufts, 13 Me. 302.

2 Franklin Bank v. Pratt, 31 Me. 501; Ledyard v. Chapin, 6 Ind. 320; Blodget v. Wadhams, Hill & Den. 65.

3 Mattox v. Weand, 19 Ind. 151.

4 Pierce v. Potter, 7 Watts, 475.

5 Erskine v. Townsend, 2 Mass. 493; Reading, etc., 8 Mass. 551; Merrill v. Chase, 3 Allen, 339; Furbush v. Goodwin, 25 N. H. 425.

6 Donnelly v. Simonton, 13 Minn. 301.

7 Sherwood v. Dunbar, 6 Cal. 53.

mortgagor to meet his paper; and in such cases a mere release of the mortgage does not discharge the debt; the debt still exists until it is paid. A mortgagee, from whom an assignee in bankruptcy has, after a sale of the property, recovered its value by action, upon the ground that the mortgage was fraudulent, may maintain an action against the debtor on the mortgage note. A mortgage being declared fraudulent, does not, as a matter of course, make the debt so; it may be void for a variety of reasons, none of which affect the *bona fides* of the debt; as, where it is not filed, or, if filed, not renewed, or possession of the property retained by the mortgagor, or he may be selling the property, any one of which may render the security void, as to creditors, but will not affect the debt.[1]

§ 171. **Release of a Mortgage may be by Parol.**—It is not necessary that a release of a chattel mortgage be recorded,[2] as the payment of the debt may be shown by parol evidence.[3] A mortgage may be discharged by a parol release for a sufficient consideration, and such release may be shown by circumstances, declarations and acts of the parties inconsistent with the continued existence of the mortgage.[4]

§ 172. **Effect of Payment of the Mortgage Debt.**—On payment of the debt, to secure which a mortgage of personal property is made, whether before or after condition broken, the property revests in the mortgagor without redelivery or resale, or the cancel-

[1] Whitney v. Willard, 13 Gray, 203; Wallis v. Long, 16 Ala. 738.

[2] Bigelow v. Smith, 2 Allen, 264.

[3] Thornton v. Wood, 42 Me. 282.

[4] Ackla v. Ackla, 6 Penn. 228; Wallis v. Long, 16 Ala. 738.

ing of the mortgage,[1] and the effect will be the same where the mortgagee releases the mortgagor from all the debts and liabilities secured by the mortgage.[2] Where, by a sale of a portion of the property mortgaged, the whole debt and expenses have been paid, the mortgagee's right of possession over the rest of the goods is at an end as against the mortgagor or his assignee;[3] and if the mortgagee, on the mortgage debt being tendered, refuses to deliver the property, and it is afterwards lost or destroyed, it is the mortgagee's loss.[4] It is held by some courts that a tender of the money due on a mortgage after breach of condition does not revest the title in the mortgagor,[5] and does not discharge the mortgage. This is on the principle that the mortgagee's title becomes absolute after default.

§ 173. **A Mortgage Once Paid Cannot be Used Against a Mortgagor or Renewed Against Creditors.**—A mortgage is security only for the debt thereby secured, and cannot be held for other debts of the mortgagor, even as against him, and the mortgagee will be compelled to discharge the mortgage upon payment of the debt.[6] Where a note secured by mortgage has been once paid, the mortgagee has no right to hold the same as security for any damages which he may sustain by reason of the failure of the mortgagor to perform another agreement, nor as secur-

1 Parks v. Hall, 2 Pick. 206; Harrison v. Hicks, 1 Port. 423; Leighton v. Shapely, 9 N. H. 359; Griffin v. Lavell, 42 Miss. 402; Rogers v. De Forest, 7 Paige, 272; McClelland v. Remsem, 36 Barb. 622.

2 Armitage v. Wickliffe, 12 B. Mon. 488.

3 Bellamy v. Dowd, 11 Iowa, 285.

4 Goodman v. Pledger, 14 Ala. 114.

5 Merritt v. Lambert, 7 Paige, 734; Smith v. Kelly, 27 Me. 237; Kelly v. Smith, 27 Me. 237; Halstead v. Swartz, 1 Thomp. & Cook, 559.

6 Beardsley v. Tuttle, 11 Wis. 74.

ity for advances subsequently made, nor to secure the payment of the mortgagor's indebtedness upon a final settlement. This rule is well settled, and particularly true where one partner gave a mortgage on his individual property to secure a partnership debt, and is also applicable in a case where a wife gives a mortgage on her separate property as security for another.[1] An outstanding satisfied mortgage cannot be set up against the mortgagor,[2] nor can it be continued in force by parol agreement.[3] No action can be sustained on a mortgage after the mortgage debt has been satisfied;[4] and the assignment, for a valid consideration, with the consent of the mortgagor of a mortgage conditioned to save a mortgagee harmless from his liability as surety on a note, is void after the cancellation of such note.[5] So where the mortgagor pays and takes up the note secured, and the next day redelivers it to the mortgagee, and takes back part of the money paid on the note, has the balance endorsed on it, and agrees with the mortgagee that the mortgage shall remain as security for the money repaid to him, and for a collateral liability of the mortgagee, the mortgage, having been once discharged by the payment of the debt secured, is not revived by the subsequent transaction as against a creditor who levies without notice.[6]

[1] Spencer v. Fredendall, 15 Wis. 666; Leffingwell v. Freyer, 21 Wis. 392.

[2] Peltz v. Clarke, 5 Pet. 481; Brooks v. Ruff, 37 Ala. 371.

[3] Furbush v. Goodwin, 25 N. H. 425; Merrill v. Chase, 3 Allen, 339; Erskine v. Townsend, 2 Mass. 493; Reading of Judge Trowbridge, 8 Mass. 551; Whitehead, *ex parte*, 19 Ves. 211; James v. Morey, 2 Cow. 246; Averill v. Loucks, 6 Barb. 19; Mead v. York, 6 N. Y. 449; Hooper, *in re*, 1 Merivale, 7.

[4] Williams v. Thurlow, 31 Me. 392.

[5] Brooks v. Ruff, 37 Ala. 371.

[6] Bowman v. Manter, 33 N. H. 530.

§ 174. **When Payment will be Presumed.**— Payment of the mortgage debt discharges the lien of a mortgage, and the mortgagee usually satisfies, or discharges the mortgage by an entry of record, in order to give the public notice of that fact. Cases arise where there is no record evidence of satisfaction, it therefore becomes necessary to ascertain when payment will be presumed. The rule of law is somewhat different in the case of chattel mortgages from that of mortgages of real estate. In the latter case there is no presumption of payment as long as the statute of limitations does not bar an action on the note, or mortgage, according to the application of the statute, which in some States is applied to the note, in others to the mortgage, unless there is a release, as provided for by statute, on the margin of the record. In the case of chattel mortgages, in many States the statutory provisions limit the period of time for which they may be valid securities, as against creditors, without refiling or renewal, and until such time elapses there would be no presumption of any satisfaction or payment. In States where a chattel mortgage may be a valid security until the statute of limitations would bar an action on an unsecured promissory note, or an action for the recovery of personal property, there will be no presumption until such time expires. There are in many States penal statutes, which are not only just, but are necessary to prevent fraud, which give a mortgagor an action to recover damages (the amount of which is fixed by statute), where a mortgagee fails to discharge or release of record a mortgage, when it has been paid, and the debt satisfied in full. In those States, there should be no presumption in the case of valid mortgages, for

every one is presumed to know the law, and a *bona fide* mortgagee, with knowledge of the penalty for failing to satisfy the record, will in all cases take prompt means for complying with the law.

Presumptions are not made for the benefit of the mortgagor, but in behalf of his personal representatives, creditors and purchasers. Where a mortgagor has possession of the notes secured by mortgage, it will be *prima facie* evidence that they have been paid by him, as a mortgagee will be presumed to have them in case they have not been paid; they belong to him, and without the notes he would have no mortgage that would be of any value, unless the notes were lost or destroyed.[1] So where a mortgagee has brought suit on the mortgage, and it has been dismissed for want of prosecution, and the dismissal acquiesced in for a long time, it is to be presumed that the mortgage is satisfied.[2] And where a mortgagee allows a note to run for a great length of time, without payment of any part of the debt, or even interest; this will amount to a presumption that he has abandoned his rights.[3] Where a mortgagee takes possession of the mortgaged property, after maturity of the debt, and afterwards the mortgagor is in possession of the property, it will be presumed that the mortgaged debt has been paid;[4] but no such presumption will be made where there is no evidence that the mortgagee was ever in possession of the mortgaged property. Where a mortgagee, having made an arrangement with the mortgagor to discharge the mortgage, for the benefit of a purchaser, subsequently signed and sent the mortgagor a written instrument,

[1] Smith v. Smith, 15 N. H. 55; Johnson v. Nations, 26 Miss. 147.

[2] Nelson v. Lee, 10 B. Mon. 495.

[3] Blake v. Lane, 5 Jones Eq. 412.

[4] Carpenter v. Bridges, 32 Miss. 265

agreeing to discharge the mortgage, and to hold the purchaser harmless in relation to it; the mortgagor delivered the same to the purchaser, who carried it to the office where the mortgage was recorded, and an entry was made on the margin of the record, as follows: "This mortgage, having been duly canceled by the mortgagor, and an order for the discharge given by the mortgagee, therefore this record is made," signed by the recorder; it was held that these facts were evidence from which a jury might find that there had been a *bona fide* discharge of the mortgage.[1]

§ 175. **What will not Discharge a Mortgage.** —Questions sometimes arise as to the effect of payments made by third parties of a debt secured by mortgage, and whether a mortgage is extinguished by payment of the debt which it secures, or whether the estate of the mortgagor and mortgagee becomes merged. It is a well-settled rule of law that a merger never takes place when the requirements of justice or the intention of the parties demand it should not.[2] Payment to a mortgagee does not extinguish the mortgage debt, if such is not the intention of the parties to the payment;[3] it operates either as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, if it is for his interest to uphold the mortgage.[4] Thus, where A. took a mortgage on property subject to four

[1] Stowell v. Goodall, 6 Cush. 452.

[2] Sheldon v. Edwards, 35 N. Y. 279; Stave v. Ellis, 6 Johns. Ch. 393; Forbes v. Moffatt, 18 Ves. 384; Millspaugh v. McBride, 7 Paige, 509; Walker v. Stone, 20 Md. 195; Champney v. Cooper, 32 N. Y. 543.

[3] N. H. Savings Bank v. McPartlan, 40 Conn. 90.

[4] Hatch v. Kimball, 14 Me. 9; Heath v. West, 26 N. H. 191.

prior mortgages, three of which contained a power of sale upon such terms as the mortgagees deemed proper, these prior mortgages being forfeited, the mortgagees sold the property to A., A. foreclosed his mortgage and sold the property for an amount much less than the four prior mortgages; the holder of a fifth mortgage prior in time to the one to A., claimed that the proceeds of A.'s sale should be applied to the payment of his mortgage debt; held, that A. was, in effect, an assignee of the first four mortgages, and, as such, had a right to apply the proceeds of the sale to their payment.[1] So the bidding in of property at a sheriff s sale on execution, where the sale is made subject to a mortgage by the judgment debtor, and the subsequent taking by the purchaser of an assignment of the mortgage, will not operate as a satisfaction of the mortgage. And if the mortgage has not been paid or foreclosed at the time of its transfer to the purchaser, it will be a subsisting mortgage, and the purchaser will be guilty of no fraud in representing it as unpaid. Under these circumstances, the purchaser has a right either to pay off or take an assignment of the mortgage.[2] Where the owner of land, leased to the owner of personalty thereon, as a steam saw-mill, purchases the same and the lease, such purchase does not operate to extinguish the lien of an existing chattel mortgage thereon, nor prevent its enforcement by one to whom it has been assigned after such purchase.[3] Where a mortgagee receives an assignment of a note, and states in the receipt that, on payment of the note, he will release the mortgage, the mortgage is not thereby released until payment of the note;[4] and where a mortgagee, in assign-

[1] Walker v. Stone, 20 Md. 195.
[2] Brown v. Rich, 40 Barb. 28.
[3] Denham v. Sankey, 38 Iowa, 269.
[4] Hynes v. Rogers, 6 Litt. 289.

ing a note, indorses it and afterwards is compelled to pay it, such payment will not discharge the mortgage;[1] it must be paid with the mortgagor's funds to discharge it. If the holder of a promissory note indorse it to a third person and secure it by mortgage, the mere failure of the mortgagee to present the note and give notice of non-payment will not discharge the mortgage.[2] So a discharge in bankruptcy does not discharge a mortgage debt, so far as the same is necessary to uphold the mortgage.[3] The bankrupt law protects all valid liens, and if it is a *bona fide* security, it will not be affected by the mortgagor's insolvency. A mortgagee, by making his debtor his executor, does not thereby extinguish the mortgage.[4] A confession of judgment by a mortgagor, after the execution of a mortgage and the maturity of the debt, will not affect the security;[5] but a satisfaction of the judgment will satisfy the debt, and the mortgage becomes *functus officio*. The cancelment of a mortgage obtained by fraudulent representations to the injury of third persons is void,[6] and a court of equity may revive it.[7] A judicial sale to enforce a mortgage for the security of a stock loan by a bank does not release the mortgage for the security of subscription of stock.[8] A bequest of money by a mortgagee to a mortgagor does not extinguish the mortgage debt *pro tanto*, unless there is something in the terms of the bequest which shows such an intention.[9]

1 Rogers v. Traders' Ins. Co. 6 Paige, 583; Terry v. Woods, 14 Miss. 139.

2 Mitchell v. Clark, 35 Vt. 104.

3 Chamberlain v. Meeder, 16 N. H. 381.

4 Miller v. Donaldson, 17 Ohio, 264.

5 Flannagan v. Westcott, 3 Stockt. 264.

6 McLean v. Lafayette Bank, 3 McLean, 587.

7 Fassett v. Smith, 23 N. Y. 252; Barnes v. Cammack, 1 Barb. 392.

8 Haynes v. Piper, 14 La. 248.

9 Harrington v. Brittain, 23 Wis. 541.

# CHAPTER XVII.

## OF THE ASSIGNMENT OF MORTGAGES.

How a Mortgage is Assigned.—Indorsement of the Mortgage Note.—Effect of such Indorsement.—Of Several Notes Secured by one Mortgage.—Subrogation of Creditors.—Strangers.—Notice of Assignment.—Effect of Assignment.—Rights of Assignee, Mortgagor, etc.—Assignment of the Mortgage Without the Debt.—Liability of Assignor.—Assignment of Mortgagee's Interest.—Of the Rule that an Assignee takes Subject to Equity of Assignor.—Modification of the Rule.—Distinction Between Negotiable and Non-negotiable Notes.

§ 176. **Mortgage an Incident to the Debt.**—As we have already shown that a mortgage is a mere security for a debt, it may become important to know how a mortgagee may realize upon the mortgage security without selling the property incumbered, or subjecting it by legal process to the satisfaction of his debt. A mortgage note may not be available to the mortgagee, by reason of the great length of time prior to its maturity, and therefore, unless by reason of some default or breach of condition, a mortgagee has no remedy against the mortgagor to compel him to make payment, but must await the time specified in the note, unless he can dispose of the note and security to some third party. He may sell and transfer the note at any time before maturity or payment, provided he can find a purchaser; and the mode of transferring his interest in the note and mortgage, the rights of the transferee and the remedy of the mortgagor, will be the subject-matter of this chapter. It is a well-settled principle

of law that the mortgage debt is the principal and the security the incident, and the assignment or transfer of a negotiable note by indorsement operates as a transfer of any mortgage given to secure its payment. The assignment of the principal draws after it the incident.[1]

In some of the States it is held that a transfer of a note secured by mortgage does not at law assign the mortgage, but that the assignee has an interest in the mortgage, which will be protected in courts of law as well as in equity. This is one of the exceptions to the

[1] Bank of Ind. v. Anderson, 14 Ia. 544; Hamilton v. Lubbukee, 51 Ill. 415 Carpenter v. Longan, 16 Wall 271 Keyes v. Wood, 21 Vt. 631; Johnson v. Hart, 3 John. Ch. 322; Lawrence v. Knapp, 1 Root. 288; Terry v. Woods, 14 Miss. 139; Homes v. McIndoe, 44 Miss. 94; Blair v. Bass, 4 Blackf. 539; Slaughter v. Foust, 4 Blackf. 379; Green v. Hart, 1 John. 580; Pattison v. Hull, 9 Cow. 747; Jackson v. Blodgett, 5 Cow. 202; Martin v. Mowlin, 2 Burr. 970; Emanuel v. Hunt, 2 Ala. 190; Kurtze v. Sponable, 6 Kans. 395; Cullum v. Erwin, 4 Ala. 452; Laberge v. Chavin, 2 Mo. 179; Dick v. Mowry, 17 Miss. 448; Lewis v. Starkie, 18 Mo. 120; Conner v. Banks, 18 Ala. 42; Paine v. French, 4 Ohio, 318; Cooper v. Ulmann, Walk. Ch. 251; Betz v. Hebner, 1 Penn. 280; Clearwater v. Rose, 1 Black. 137; Hills v. Elliott, 12 Mass. 26; Stewart v. Preston, 1 Branch. 10; Miles v. Gray, 4 B. Mon. 417; Burdett v. Clay, 8 B. Mon. 287; Blood v. Vollers, 6 La Ann. 784; Race v. Bruen, 11 La Ann. 34; Jones v. Quinnipack Bank, 29 Conn. 25; Pope v. Jacobs, 10 Ia. 262; Sangster v. Love, 11 Ia. 580; Mapps v. Sharp, 32 Ill. 13; Chappell v. Allen, 38 Mo. 273; Potter v. Stevens, 40 Mo. 229; Hyman v. Devereux, 63 N. C. 624; Rigney v. Lovejoy, 13 N. H. 247; Thorndike v. Norris, 24 N. H. 454; Sheldon v. Sill, 8 How. 441; Stewart v. Preston, 1 Branch. 15; Ohio L. and Trust Co. v. Ross, 2 Md. Ch. 25; Richards v. Syms, Barn. Ch. 90; Wilson v. Troup, 2 Cow. 195; Jackson v. Curtis, 19 John. 325; McClintic v. Wise, 25 Gratt. 448; Whittemore v. Gibbs, 24 N. H. 484; Brown v. Blydenburg, 7 N. Y. 141; Graham v. Newman, 21 Ala. 497; Carter v. P and M. Bank, 22 Ala. 743; Fisher v. Otis, 3 Chand. (Wis.) 83; Martineau v. McCollum, 4 Chand. 153; Rice v. Cribb, 12 Wis. 179; Ord v. McKee, 5 Cal. 515; Cow v. Vance, 4 Ia. 434; McMillan v. Richards, 9 Cal. 365; Martin v. McReynolds, 6 Mich. 70; Perkins v. Sterne, 23 Tex. 561; Henderson v. Herod, 28 Miss. 658; Catlin v. Henton, 9 Wis. 476; Garrett v. Puckett, 15 Ind. 485; Vanzandt v. Almon, 23 Ill. 30; Croft v. Bunster, 9 Wis. 503; Scott v. Turner, 15 La. 343; Swartz v. Leist, 13 Ohio S. 419; Gower v. Home, 20 Ind. 396; Herring v. Woodhull, 29 Ill. 92; Crane v. March, 4 Pick. 131; Duval v. McCloskey, 1 Ala. 708; Johnson v. Carpenter, 7 Minn. 176; Sims v. Shannon, 9 Md. 296; Caruthers v. Humpreys, 12 Mich. 270; Pardee v. Lindley, 31 Ill. 174; Olds v. Cummings, 31 Ill. 188.

general rule.[1] Thus, where, during the pendency of a foreclosure suit, a person takes a lease of the mortgaged premises from the mortgagor and gives to him a chattel mortgage to secure the rent, and the chattel mortgage is subsequently assigned to a third person, the assignee takes it subject to all the equities and infirmities which can attach to it by reason of the final decree in the foreclosure suit, although he is not a party to such suit. But he is not bound by any proceeding to compel the tenant to attorn to a receiver and pay rent to him, unless he has notice and opportunity to be heard. So far as the claim of such assignee, under his chattel mortgage, is concerned, he stands in the place of landlord and lessor, and is entitled to be heard on an application for an order to appoint a receiver, and directing the tenant to attorn and pay rent to such receiver.[2]

The estate of a mortgagee in the mortgaged property passes by assignment of the mortgage debt to the assignee or transferee, and no beneficial interest remains in the mortgagee;[3] so that if a debt be sold or assigned, and there is nothing said at the time of the existence of any mortgage, the assignee will be entitled to the benefit of it, although he did not know of the existence of a mortgage to secure such debt;[4] and if the

[1] Dwinnell v. Perley, 33 Me. 197; Warren v. Homestead, 33 Me. 256; Stone v. Locke, 46 Me. 445 Zeiter v. Bowman, 6 Barb. 103.

[2] Zeiter v. Bowman, 6 Barb. 133.

[3] Crosby v. Brownson, 2 Day, 425; Potter vs. Holden, 31 Conn. 385; Beach v. Derby, 19 Ill. 617.

[4] Betz v. Heebner, 1 Penn. 280; Parish v. Brooks, 4 Brews. 154; Newman v. Springfield Ins. Co., 17 Minn. 123; Caldwell v. Hartup, 70 Penn. 74; Martin v. Richardson, 68 N. C. 255; Burgess v. Cave, 52 Mo. 193; Farmers' Bank v. Wilson, 3 Houst. 220; Blydenburgh v. Thayer, 1 Abb. N. Y. App. 156; Atkinson v. Runnells, 60 Me. 440; Hamilton v. Marks, 52 Mo. 78; Bishop v. Garcia, 14 Abb. Pr. N. s. 69; Tate v. Cousin, 50 Mo. 152; Keyes v. Wood, 21 Vt. 331.

mortgagee retains the mortgage, he will hold it as trustee for the assignee of the debt. In case a suit is brought by an assignee of a note, the presumption is that the mortgage follows the note; and after notice to the holder of the note, to produce the mortgage upon the trial, and its non-production, the mortgagor may introduce secondary evidence of its contents.[1] But where the owner of a note and mortgage given to secure the same assigns them upon a separate paper, for the purpose of enabling the assignee to make collection, such assignment will not pass the legal title.[2] An assignment of a mortgage, executed by a treasurer of a corporation, though under the seal of the corporation of which he has charge, without the direction or subsequent ratification of the managers, is void.[3]

The interest of a mortgagee is a mere chattel, and where a mortgage is given to secure a note payable to bearer, the interest of a mortgagee will pass by the mere delivery of the note, and the mortgage as an incident to the debt, without any other evidence of assignment.[4] A mortgage may be assigned like other evidences of debt, by an indorsement; a mere delivery of the mortgage security with the transfer of the debt is a sufficient assignment of the mortgage.[5] Thus, where a mortgagor executes and delivers sundry notes and a mortgage to secure the payment of such notes, to indemnify the mortgagee for indorsements made for the mortgagor's accommodation, with power to dispose of the property mortgaged if the indorsed notes are not paid. The mortgagee indorses

1 Downes v. Button, 26 N. H. 338.
2 Fortier v. Darst, 31 Ill. 212.
3 Jackson v. Campbell, 5 Wend. 572.
4 Southerin v. Mendum, 5 N. H. 420.
5 King v. Harrington, 2 Aik. 33; Clearwater v. Rose, 1 Blackf. 137; Blake v. Williams, 36 N. H. 39; Barnes v. Lee, 1 Bibb. 526; Rigney v. Lovejoy, 13 N. H. 247; Craine v. Paine, 4 Cush. 483.

the notes, but before he becomes liable on any of his indorsements he assigns the mortgage and notes secured by it, with the same power to dispose of the mortgaged property that he had. The assignment is valid and conveys all the assignor's interest in the notes and mortgage to his assignee. If the mortgagee afterwards pays a large amount on his indorsements, his assignee takes the benefits of such payments and acquires a definite interest in the property, to the extent of such payments.[1] The assignment of a mortgagee's interest of itself conveys the right to receive payment on the notes described in the mortgage. An assignment of the notes by indorsement is unnecessary in case of a *bona fide* sale and delivery of them to the assignee, and possession of the notes, by him, although necessary to rebut the presumption of payment arising from their absence, is not essential to pass such right;[2] and a sale of a note secured by mortgage is an equitable transfer of the mortgage to the purchaser of the note.[3]

A transfer in writing made upon a mortgage of "the within mortgage and the notes therein described," does not convey the legal title to the notes, although the assignee might sue in his own name, nor does the assignor in such case warrant the solvency of the maker of the notes; he impliedly warrants that they have not been paid to him; yet, if they have been paid to him, he is not liable on the contract of assignment, but only for the consideration received for the transfer.[4] But parol evidence is admissible to show that the assignor warranted the securities.[5] The lien

[1] Potter v. Holden, 31 Conn. 385.
[2] King v. Harrington, 2 Aik. 33.
[3] Burton v. Baxter, 7 Blackf. 297.
[4] French v. Turner, 15 Ind. 59.
[5] Hahn v. Doolittle, 18 Wis. 196.

acquired by the assignee will not be lost by extending the day of payment and taking a new note in his own name, but will continue to attend the debt until it is paid or extinguished, or the lien itself destroyed by contract between the parties.[1] When the assignee of a mortgage transfers it back to a prior holder, who is in possession of the mortgaged property, the transfer, though not in writing, is a release of the assignee's claim to the property.[2]

The rights of a second or any subsequent assignee are co-extensive with those of the first,[3] but no greater than his assignor.[4] As a general principle the rights of parties growing out of the assignment of debts, secured by mortgage, will be governed by the law of the place where the assignment is made.[5] A recorded assignment of "so much of a mortgage, and the property therein described, as will amount to" a certain sum less than the mortgage debt, passes no legal title as against a subsequent purchaser from the mortgagee, without actual notice of the assignment.[6]

§ 177. **Of the Effect of an Assignment where Several Notes are Secured by One Mortgage.**— While it is well settled that an assignment of the debt secured by mortgage carries with it the security, the effect of an assignment of one or more notes, when secured by a mortgage to one or more parties, is not so well settled. If several notes secured in and by the same mortgage are assigned to different persons, as a general rule the holder of each note will acquire, by the

1 Conner v. Banks, 18 Ala. 42.
2 Dean v. Millard, 1 R. I. 283.
3 Hoitt v. Webb, 36 N. H. 158.
4 Leach v. Kimball, 34 N. H. 538.
5 Bank of England v. Tarleton, 23 Miss. 173.
6 French v. Haskins, 9 Gray, 195.

assignment, an equitable interest in the mortgage. The interest which each assignee acquires in the mortgage is purely equitable and will be controlled by the considerations which operate on courts of equity in adjudicating conflicting equities between parties. The assignment may be inoperative when the rights of innocent purchasers intervene who have been misled by the improper representations of the assignee or lulled into security by his silence.

The assignment of one note is an assignment *pro tanto* of the mortgage, and if there are several notes secured by the same mortgage the indorsement and delivery of one note carries with it, in the absence of any contract to the contrary, a *pro rata* proportion of, and participation in, the security.[1] In case, however, that the notes are payable at different times the assignees are entitled to payment from the mortgaged property in the order of the maturity of the notes.[2] In the absence of any countervailing equity the right of the assignee of the note first due to a preference over the holder of one falling due subsequently, and secured by the same mortgages, attaches from the time of the assignment of the first note; such prior right being a vested right cannot be divested by the failure of the prior assignee to commence proceedings to sub-

[1] Bushfield v. Meyer, 10 Ohio S. 334; Page v. Pierce, 26 N. H. 317; Phelan v. Olney, 6 Cal. 478; Keyes v. Wood, 21 Vt. 331; Hancock's Appeal, 34 Penn. 155; Hinds v. Moers, 11 Ia. 41; Swartz v. Leist, 13 Ohio S. 419; Gower v. Howe, 20 Ind. 396; Herring v. Woodhull, 29 Ill. 92; Cullum v. Erwin, 4 Ala. 452; Langdon v. Keith, 9 Vt. 299; Anderson v. Baumgartner, 27 Mo. 80; Johnson v. Brown, 31 N. H. 405.

[2] Grapengether v. Ferjevary, 9 Ia. 163; Rankin v. Major, 9 Ia. 297; Sangster v. Love, 9 Ia. 580; State Bank v. Tweedy, 8 Blackf. 447; Stanley v. Beatty, 4 Ind. 134; Lyman v. Smith, 21 Wis. 674; Hunt v. Stiles, 10 N. H. 466; Bank, etc., v. Covert, 13 Ohio, 240.

ject the property to the payment of such note before the maturity of the other notes.[1]

A mortgagee, where he has two or more notes secured by one mortgage, transfers and assigns one of the notes so as to give the assignee of such note priority in satisfaction out of the mortgaged property, may satisfy the mortgage as to the other notes prior to such assignment, or he may assign one of the notes and the mortgage with such note, so that, as to the others, the holder must take his chances of obtaining satisfaction out of the surplus or out of other property belonging to the debtor. This arrangement is a matter wholly with the mortgagee; it affects no one but himself and the mortgagor; if he chooses to relinquish his security no one else can complain.[2] Where several promissory notes are secured by the same mortgage, and the mortgagee was assigned to one person, the note first becoming payable, and has assigned the residue of the notes, together with the mortgage, to another person, the assignee of the first note is entitled, equally with the holder of the other notes, to the benefit of the mortgage security. But a tender, by the holder of the first note to the holder of the other notes, accompanied with a demand for the transfer of the mortgage, will be construed as an admission that the person to whom the tender was made has a prior lien, under the mortgage, for the payment of his notes, and will preclude the holder of the first note from afterwards making any claim inconsistent with such submission. But the holder of the first note,

1 Lyman v. Smith, 21 Wis. 674.

2 Noyes v. White, 9 Kans. 640; Wright v. Parker, 2 Aik. 212; Grattan v. Wiggins, 23 Cal. 30; Bryant v. Damon, 6 Gray, 564; Bank v. Tarleton, 23 Miss. 123; Langdon v. Keith, 9 Vt. 299; Cooper v. Ulman, Walks Ch. 251; Cullum v. Erwin, 4 Ala. 452.

in such case, is entitled to claim the full benefit of the mortgage security as against the mortgagor and all persons claiming under him.[1] But a mortgagee cannot divest the lien of an assignee by a subsequent assignment of the mortgage; as soon as one or more notes are assigned, without any agreement for priority, the right of the assignee becomes fixed and cannot be divested by the mortgagee,[2] nor can he be permitted to come into competition with his assignee if the mortgage is insufficient to pay both parties.[3] Where an assignment is made to several, each of whom advances his own portion of the consideration money, and, by the express terms of the assignment, is to acquire an interest in the mortgage in proportion to the amount advanced by him, if the portion advanced by any one is fully paid by the mortgagor and accepted by such assignee, his interest in the mortgage is fully discharged.[4] Where there are several notes or demands secured by one mortgage, it is an incumbrance for the security of all and each of the notes, in whosesoever hands they may legally be, until all are paid.[5]

§ 178. **Subrogation of Strangers.**—A third person who pays off a mortgage debt for his own security, may be substituted in place of the obligor or mortgagor and retain the security.[6] He may hold such security for his own protection without any written assignment.[7] If the money is paid by agreement the party will be subrogated to the rights of the mortgagee, but only so

[1] Belding v. Manly, 21 Vt. 550.
[2] Hough v. Osborne, 7 Ind. 140.
[3] Ventress v. His Creditors, 20 La. 359; Cullum v. Erwin, 4 Ala. 452.
[4] Furbush v. Goodwin, 26 N. H. 425.
[5] Johnson v. Brown, 31 N.H. 405.
[6] Coster, *in re*, 2 John. Ch. 503.
[7] Moore v. Beasom, 44 N. H. 215.

far as to save him harmless.[1] But a mere stranger, who voluntarily pays off a mortgage, but who fails to take an assignment, and allows the mortgage to be canceled and discharged, cannot afterwards come into equity, in the absence of fraud, accident or mistake, have the mortgage reinstated and himself substituted in place of the mortgagee.[2] A person cannot make another his debtor by paying the debt of the latter without his request or consent.[3] Where a creditor of a mortgagor seeks to be substituted for certain mortgagees, and it is shown that the property mortgaged has been sold under the mortgages for its full value, there is nothing remaining of the mortgaged property which can be subjected to the payment of any debts, and there is no right of subrogation.[4] So an assignee of a mortgage that has been paid in full acquires no title by foreclosing the mortgage and purchasing at the mortgage sale.[5]

§ 179. **Assignment of Mortgages without the Debt.**—A mortgage being a mere security, an incident to the debt, available to the mortgagee only in case of nonpayment of the debt, in itself amounts to nothing, it is only a lien as long as there is a debt, when that is paid, the mortgage, whether satisfied or not, is a

1 Bailey v. Warners, 28 Vt. 87.

2 Guy v. Du Uprey, 16 Cal. 195.

3 Cook v. Davis, Dud. (S. C.) 67; Lewis v. Lewis, 3 Strobh. 530; Mayor v. Hughes, 1 G. & J. 497; Oden v. Elliott, 10 B. Mon. 313; Rensselaer, etc. Factory v. Reid, 5 Cow. 603; Richardson v. Williams, 49 Me. 548; Richardson v. McRay, 1 Tread. 472; Smith v. Poor, 37 Me. 462; Stephens v. Broadnax, 5 Ala. 258; Taylor v. Baldwin, 10 Barb. 626; Thompson v. Chiltien, 3 La. 116; Turner v. Edgerton, 1 G. & J. 433; Weakley v. Brahan, 2 Stew. 500; Winsor v. Savage, 9 Met. 346; Woodford v. Leavenworth, 14 Ind. 311.

4 Bank of Ky. v. Milton, 12 B. Mon. 340.

5 Cameron v. Irwin, 5 Hill. 272.

nullity. In order, therefore, to give an assignee or purchaser any rights under a mortgage, the debt or principal thing must be assigned. No interest passes unless the debt goes with it. In order that an assignee can make it available, he must be a creditor of the mortgagor; in order to become a creditor, the debt must be assigned, which the mortgage is given to secure.[1] So that the assignment of a mortgage without the debt is a nullity.[2] A mortgagee's interest prior to foreclosure cannot be conveyed by way of mortgage as a subsisting interest, as the mortgage cannot be separated from the debt.[3]

§ 180. **Effect of an Assignment of a Mortgage. The Rights of the Assignee. Mortgagor. The Effect of Notice of the Assignment.**—As we have seen that a simple indorsement or transfer of a note will carry with it a mortgage given to secure it, we are now to examine the effect of such transfer. In case of an assignment of a debt or other *chose in action*, which from its nature is incapable of delivery, the assignee must give notice to all who have a legal or equitable interest in the property, by which he will

[1] Carter v. Bennett, 4 Fla. 283; Thayer v. Campbell, 9 Mo. 280; Bailey v. Gould, Walk. Ch. 478.

[2] Johnson v. Cornett, 29 Ind. 59; Polhemus v. Trainer, 30 Cal. 685; Merritt v. Bartholick, 36 N. Y. 44; Cooper v. Newland, 17 Abb. Pr. 372; Wyman v. Snead, 31 How. Pr. 1; Thayer v. Campbell, 9 Mo. 280; Carter v. Bennett, 4 Fla. 283; Warden v. Adams, 15 Mass. 233; Bailey v. Gould, Walk. Ch. 478; Doe v. McLosker, 1 Ala. 708; Hill v. Edwards, 11 Minn. 29; Peters v. Jamestown Bridge, 5 Cal. 334; Huntington v. Smith, 4 Conn. 235; Rankin v. Major, 9 Ia. 297; Perkins v. Sterne, 23 Tex. 563; Hays v. Lewis, 17 Wis. 212.

[3] Aymar v. Bill, 5 Johns. Ch. 570.

equities as if it were not secured by mortgage.[1] It is held by some courts that, where the assignment is made to secure a pre-existing debt, the assignee must hold it subject to all the equity which the assignor was subject to.[2] The doctrine of a pre-existing debt has been treated of in a preceding part of this work, under the head of Consideration, chapter III. While some courts still make the distinction between two classes of persons, one who pays money at the time of the assignment, and one who pays it some time prior to it, it cannot be said that it is a very equitable one. Why A., who loans B. money, and after three or six months obtains security for it, should stand in a worse position than C., who gets his security at the time of the loan, is a matter that is difficult to understand; B. certainly would not give a security to either if he was not indebted, and the reason for distinguishing between the two in regard to the *consideration*, whether paid prior or at the time, is not very plausible; although it may be deemed well settled in some States, as long as there is a *bona fide* and a valuable consideration, it can certainly make but little difference where it is pre-existing or not.

Fraud in procuring a note and mortgage may be set up against the assignee in action upon them, as well as against the person to whom they were made.[3] An assignee who has taken possession of mortgaged property which had been mortgaged by the debtor in fraud of his creditors, and has filed a bill in equity to prevent a transfer of the mortgage by the mortgagee, may hold the

1 Howard v. Gresham, 27 Geo. 347; Nichols v. Lee, 10 Mich. 526.

2 Glidden v. Hunt, 24 Pick. 221; Clarke v. Flint, 22 Pick. 231; Hovey v. Hill, 3 Lans. 167.

3 Marshall v. Billingsly, 7 Ind. 250: Bailey v. Smith, 14 Ohio S. 396.

same against one to whom the mortgage and the note it secured was assigned for a good consideration without notice[1] Where a note and mortgage are transferred, with notice of the fraudulent purpose of their inception, the transferee stands in no better position than the original parties to the transaction.[2]

§ 182 **Modification of the Well-settled Rule and the Reason upon which it is Based. Rule as Now Settled.**—It has been a question of considerable importance, in many courts, as to whether the general principle above stated, and apparently so well settled that an assignee takes a mortgage subject to the same equity as it was subject to, in the hands of the assignor or mortgagee, and to say that the cases can be reconciled upon any reasonable ground would be fallacious, but that the difference between the two classes of cases can be accounted for there can be no doubt and that the class of cases which are opposed to the broad application of the general rule above laid down are founded upon principles of justice there is no doubt in the author's mind; and the distinction is this, that an assignee takes subject to such equities only as existed prior to the transfer between the mortgagor and mortgagee, and that the mortgage is unaffected by any equities arising subsequently to the transfer and of which the assignee has no notice at the time the assignment or transfer is made, but that the assignee takes the mortgage as he does the note.

The general rule, as above stated, originated in England where the evidence of the debt was by bond

[1] Bigelow v. Smith, 2 Allen, 264.

[2] Chamberlain v. Barnes, 26 Barb. 160; Nellis v. Clark, 20 Wend. 24; S. C. 4 Hill. 424.

and mortgage, and the doctrine laid down in the original case of Matthews v. Walwyn, 4 Ves. 118, has been followed and adopted as the rule by almost all courts, irrespective of the fact that there was or was not a bond secured by mortgage, but has been applied to all assignments of mortgages whether made by a deed of assignment on the mortgage or by endorsement and transfer of the evidence of the debt independent of the mortgage, while it is an easy matter, in many cases, for a purchaser to ascertain the exact amount due on a note secured by mortgage, and while the doctrine of estoppel has been constantly and justly applied by courts where a purchaser has relied upon the statements of a mortgagor as to the amount due and the legality and validity of the transaction. The principle upon which the latter rule depends is derived from the civil law and has been adopted and reiterated time and again by almost every court in England and America. That is, that a mortgage is a mere security for a debt; without a debt it is a nullity; that it is not a sale or conveyance of any property, but a mere lien or pledge, to become available in case of a default or non-payment of the debt, and that the debt is the principal and the mortgage the incident; that, when the debt is evidenced by an instrument in the nature of a negotiable promissory note, the principles of law applicable to that class of paper control the rights, remedies and liabilities of the parties, the maker and holder, at the time it matures or becomes payable, while the case of Bailey v. Smith, 14 Ohio State, 396, re-asserts and establishes the general rule, "the purchaser must abide by the case of the person from whom he buys." That court, in following the long line of cases, makes no distinction

between a non-negotiable or non-assignable and a negotiable or assignable instrument, nor do any of the cases cited in the first note in this section, but follow the rule without the question being raised or decided. While in New York, the Court of Appeals decide that if mortgages are to be assimilated to commercial paper it must be done by legislative action. While it is obvious that a debt does not create a mortgage nor a mortgage create a debt, yet one cannot exist without the other; if there is no debt there can be no mortgage; it is a security, not a conveyance, and the principles which have been applied to this species of instruments since their origin, have established the doctrine beyond question that a mortgage is a security for a debt, or obligation of some kind or nature, no matter in what form it is evidenced, whether by note, bond or otherwise; so that the debt which it is given to secure is the principal and the mortgage the incident; and such has been the well-settled rule in all of the courts of this country. The rule has been so well settled that it is no longer questioned, but that the indorsement of the payee or holder of the mortgage note transfers it and its accessory, the mortgage, without any other evidence or instrument of assignment, in the same manner as any unsecured promissory note when the mortgage is given to secure that class of commercial paper.

§ 183. The doctrine once so well settled has become a matter of doubt, and while exceptions to a well-settled rule are to be regretted, the reason of the rule being that because, in a suit of law for the use of the assignee, upon the bond or covenant to collect a debt, a recovery cannot be had for a greater sum than is actually due

from the mortgagor to the mortgagee, and therefore no more shall be recovered in equity in an action to foreclose the mortgage; or that the parties, as to rights and remedies, shall stand upon the same footing in both courts; it follows, as a logical conclusion, that, when the nature of the instrument evidencing the debt and the circumstances of the transfer are such that, in a suit at law upon it against the mortgagor, the assignee can enforce its payment, regardless of any equities existing between the mortgagor and mortgagee, he should have the same rights and remedies in equity. The reason of the rule ceasing in the case of negotiable securities, transferred before maturity and without notice, the rule also ceases. The debt is the principal thing, the mortgage the incident; the transfer of the debt carries with it the mortgage. It is the debt which gives character to the mortgage and fixes the rights and remedies of parties under it, and not the mortgage which determines the nature of the debt. It cannot be contended that the securing of a negotiable instrument by mortgage destroys its negotiable character. Both principle and sound policy require that the rights and remedies of an assignee, under the mortgage, should be co-extensive with those which he has under the instrument securing the debt.[1] The Supreme Court of the United

1 Rolston v. Brockway, 23 Wis. 407; Gould v. Marsh, 1 Hun. 566; Blunt v. Walker, 11 Wis. 334; Croft v. Bunster, 9 Wis. 503; Martineau v. McCollum, 4 Chand. 153; Fisher v. Otis, 3 Chand. 83; Stillwell v. Kellogg, 14 Wis. 461; Rice v. Cribbs, 12 Wis. 779; Crosby v. Roub, 16 Wis. 616; Carpenter v. Longan, 16 Wall. 271; Dutton v. Ives, 5 Mich. 515; Reeves v. Scully, Walk. Ch. 248; Pryor v. Wood, 31 Penn. 142; Andrews v. Hart, 17 Wis. 297; Cornell v. Hitchins, 11 Wis. 353; Bloomer v. Henderson, 8 Mich. 395; Potts v. Blackwell, 4 Jones, Eq. 58; Cicotte v. Gagnier, 2 Mich. 381; Pierce v. Faunce, 47 Me. 507; Palmer v. Yates, 3 Sand. 137; Taylor v. Page, 6 Allen, 86; Kennicott v. Supervisors, 16 Wall. 452; Peters v. Jamestown Co., 5 Cal. 334.

States in Carpenter v. Longan affirm the doctrine that an assignee takes the mortgage as he takes the note—free from the objections to which it was liable in the hands of the mortgagee. The contract, as regards a mortgage note, is that the maker shall pay it at maturity to any *bona fide* indorsee without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage is conditioned to secure the fulfillment of that contract. To let in such a defense as might be made against a mortgagee, would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, becomes a party. If a mortgagor desires to reserve such an advantage, he should give a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger."[1]

"Upon a bill to foreclose, filed by the assignee, an account must be taken to ascertain the amount due on the instrument secured by the mortgage. The amount due, in that case, was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find less was due. It is a case in which equity must follow the law."

"A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law on his note, recover judgment, and sell the mortgaged property under execution. It is not pretended that equity would inter-

[1] Hern v. Nichols, 1 Salk. 289; Carpenter v. Longan, 16 Wall. 273.

pose against him. So if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same property for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another. The mortgaged property is pledged as security for the debt. In proportion as a remedy is denied the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding."

§ 184. "The note and mortgage are inseparable, the former as the essential, the latter as the incident, *omne principale trahit ad se accessorium.* An assignment of the note carries the mortgage with it, while an assignment of the mortgage alone is a nullity."[1]

§ 185. There is considerable discrepancy in the authorities upon this question. In Bailey v. Smith, *et al.*, *supra*, a case marked by great ability and fullness of research, the Supreme Court of Ohio came to a different and contrary conclusion. The judgment was put upon the ground that notes, negotiable, are made so by statute,

1 Jackson v. Blodgect, 5 Cow. 205; Jackson v. Willard, 4 John. 43; Johnson v. Cornett, 29 Ind. 59; Polhemus v. Trainor, 30 Cal. 685; Merritt v. Bartholick, 36 N. Y. 44 Thayer vs. Campbell 9 Mo. 280; Hill v. Edwards, 11 Minn. 29; Huntington v. Smith, 4 Conn. 235; Hays v. Lewis, 17 Wis. 212; Perkins v. Sterne, 23 Tex. 563; Warden v. Adams, 15 Mass. 233; Rankin v Major, 9 Ia. 297; Carter v. Bennett, 4 Fla. 283; Martin v. Mowlin, 2 Burr. 969.

while there is no such statutory provisions as to mortgages, and hence the assignee takes the latter as he would any other *chose in action*, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers. The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial; the result follows, irrespective of that question; the process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing, the mortgage an accessory; equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence; when the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sed sequitur suum principale.* In Pierce v. Faunce, 47 Me. 513, the court say: "A *bona*

*fide* mortgagee is equally entitled to protection as the *bona fide* grantee; so the assignee of a mortgage is on the same footing with a *bona fide* mortgagee. In all cases the reliance of the purchaser is placed upon the record, and when that discloses an unimpeachable title, he receives the protection of the law as against unknown and latent defects." Mathews v. Wallwyn, 4 Vesey, 118, is usually relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure a non-negotiable bond; the mortagee assigned the bond and mortgage fraudulently, and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally, "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due on the bond; if an action of covenant was brought by the covantee, *the account must be settled in that action.* In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment. The principal is distinctly recognized, that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the

assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment."[1]

§ 186. Where the original debt is not assignable, so as to cut off the original equities between the parties, any defense against the debt may be set up against the mortgage.[2] But the purchaser of a mortgage cannot be charged with constructive notice of anything subsequent to the mortgage except its assignment or satisfaction if duly entered of record.[3] Thus, where the mortgagee, in a mortgage made to secure a note given for property sold in violation of law, assigned the same with the note, before maturity, to one who took them for a valuable consideration without notice, such assignee obtains a good title.[4]

Where A., to secure B., gives him a mortgage upon certain property, and B. gives the mortgage to C. to file, C. promising to file it; afterwards, upon an indebtedness from A. to C., C. obtains three notes, secured by a mortgage from A., upon the same property, C., before the maturity of the three notes, transfers one to D., who takes it in good faith, knowing it is secured by mortgage to C., but not knowing of B.'s mortgage; while B.'s mortgage is a valid and prior lien to the mortgage of C., while in the hands of C., it is not so, as to such mortgage, after the transfer of the note to D., to the amount of the note.[5] A mortgage, to secure a note which was taken by a corporation *ultra vires*, is good

[1] Carpenter v. Longan, 16 Wall, 271.

[2] Martineau v. McCullum, 4 Chand. 153; Mathews v. Wallwyn, 4 Ves. 118.

[3] Peters v. Jamestown Bridge Co., 5 Cal. 334.

[4] Taylor v. Page, 6 Allen, 86.

[5] Gould v. Marsh, 1 Hun. 566.

in the hands of an innocent purchaser; in such a case the maker and mortgagor cannot set up his own unlawful act with the corporation.[1] And where one partner mortgaged the effects of the firm to pay a debt to another which did not exist, and the mortgagee assigned the mortgage to secure a *bona fide* debt of his own to one who had no notice of the state of the balances between the partners, such assignment passes a good title.[2] The selling of a mortgage for less than its nominal value does not vitiate the security;[3] as long as it is for a valuable consideration, it is of no concern to the mortgagor.[4] An assignment for a valuable considertion is good as against a subsequent *bona fide* purchaser without notice, although the assignment be not recorded.[5] The assignment of a mortgage by the mortgagee is an assignment of a power of sale contained in the mortgage, and a sale by the assignee under such power will bind the mortgagee.[6] An assignee of part of a debt secured by mortgage with a right to sell, can only sell so much of the mortgaged property as will cover the assigned interest, and cannot sell the whole or sufficient to cover the entire amount of the mortgage debt.[7]

1 Blunt v. Walker, 11 Wis. 435.
2 Potts v. Blackwell, 4 Jones Eq. 58.
3 Warner. v. Governeur, 1 Barb. 36; Lovett v. Dimond, 4 Ed. Ch. 22.
4 Adair v. Adair, 5 Mich. 204.
5 Wilson v. Kimball, 27 N. Y. 300.
6 Slee v. Manhattan Co., 1 Paige, 48.
7 Emmons v. Dow, 2 Wis. 322.

# CHAPTER XVIII.

## INTEREST OF A MORTGAGOR.

RIGHT OF JUDGMENT CREDITOR TO CAUSE MORTGAGOR'S INTEREST TO BE SOLD.—WHEN AND WHERE IT CANNOT BE TAKEN.—MODIFICATION OF THE RULE.—REASON WHY A MORTGAGOR HAS LEVIABLE INTEREST UNTIL FORECLOSURE.—MORTGAGOR'S INTEREST OR RIGHT OF REDEMPTION.—WHAT IT IS, AND HOW LONG IT EXISTS.—REASON WHY A MORTGAGOR'S INTEREST OR RIGHT OF REDEMPTION CONTINUES UNTIL FORECLOSURE.—RULE SHOULD BE SAME AT LAW AS IN EQUITY.—RIGHTS AND LIABILITIES OF MORTGAGOR.—WHEN A MORTGAGOR IS ENTITLED TO RELIEF.—WHEN AND WHERE NOT CHARGEABLE WITH LOSS.—INFANT MORTGAGOR.—WHEN ESTOPPED FROM CONTESTING MORTGAGE.

**§ 187. Of the Rights of Judgment Creditors to Cause the Mortgagor's Interest to be Seized and Sold on Execution.**—As we have already stated, a mortgagee is a simple lien creditor, whose rights are not perfected until breach of condition or default by the mortgagor. Until such time, and, in fact, as long as the mortgagor can, by bill in equity, compel a redemption, he has a leviable interest in the mortgaged property. In treating of the right of redemption, we shall fully consider the effect of a mortgage upon a mortgagor's rights, and the title which a mortgagee obtains. At present we shall simply give the law, as settled in various States, in regard to the sale of the mortgagor's right or equity of redemption, as it is termed. Chattels mortgaged may be seized and sold by virtue of an execution against the mortgagor, they being in his possession, and he, at

the time of their seizure and sale, being entitled to their possession; and a purchaser obtains the same title as that which the mortgagor possesses. There is no wrong done the mortgagee thereby, as he may still pursue his lien under the mortgage, and his rights remain the same;[1] and there is no distinction made between a mortgage payable at some future time and one payable on demand, for until demand made the mortgagor's title is held liable, in many States, when the mortgagor is in possession after condition broken.[2]

**§ 188. When and Where it Cannot be Taken on Execution.**—While the above principle seems to be well settled upon the ground that, until default, the mortgagor's right of redemption is a valuable interest, there are a large number of authorities, many of the above among them, which, where they are the supreme law of the State, establish the doctrine that, after default, a mortgagor has no leviable interest in the property[3] in

[1] Bailey v. Burton, 8 Wend. 339; Bank v. Crary, 1 Barb. 542; Carty v. Fenstemaker, 14 Ohio S. 457; Curd v. Wunder, 5 Ohio S. 92; Cotton v. Watkins, 6 Wis. 629; Duppee v. Grinnell, 69 Ill. 371; Fairbanks v. Bloomfield, 5 Duer, 434; Gaulet v. Asseler, 22 N. Y. 225; Galen v. Brown, 22 N. Y. 37; Hall v. Sampson, 35 N. Y. 214; Hamill v. Gillespie, 48 N. Y. 556; Tannahill v. Tuttle, 3 Mich. 104; Eggleston v. Mundy, 4 Mich. 295; Bacon v. Kimmell, 14 Mich. 201; Hull v. Carnly, 11 N. Y. 501; Nelson v. Ferris, 30 Mich. 497; Fugate v. Clarkson, 2 B. Mon. 41; Mechanics, &c., Co. v. Connover, 1 McCarter, 219; Liver v. Orser, 5 Duer, 501; Manning v. Monaghan, 28 N. Y. 585; Mattison v. Baucus, 1 N. Y. 295; Otis v. Wood, 3 Wend. 498; Porter v. Parmly, 43 How. Pr. 445; Rindskopff v. Lyman, 16 Iowa, 260; Randall v. Cook, 17 Wend. 53; Smith v. Dunning, 7 Wend. 135; Wheeler v. McFarland, 10 Wend. 318; Herman Ex., page 150, and cases there cited.

[2] Carty v. Fenstemaker, 14 Ohio S. 457; Ferguson v. Lee, 9 Wend. 258; Cary v. Hewitt, 26 Mich. 228; Van Brunt v Walkalee, 11 Mich. 177.

[3] Eggleston v. Mundy, 4 Mich. 295; Baltes v. Reipp, 1 Abb. N. Y. App. Dec. 78; Tannahill v. Tuttle; Bacon v. Kimmell, supra; Hamill v. Gillespie, 48 N. Y. 556; Hall v. Sampson, 35 N. Y. 274.

other States after the mortgagee has taken possession under the mortgage.[1] In Massachusetts it cannot be seized under and by virtue of an execution,[2] and such is the common law doctrine. At common law and in many States a mortgagor's interest cannot be seized on execution at law; in others, where the possession of the mortgagor is determinable at the will of the mortgagee; or after the mortgagee has taken possession; or where the mortgage gives the mortgagee the right of possession at any time; or the mortgagee has reduced the property to possession, the interest of the judgment debtor being a mere chose in action, is not liable; or where the title has become absolute, or vested in the mortgagee, as where there is no time specified in the mortgage for payment, or it provides for an impossible time of payment, or it is prior to the date of the conveyance, or immediately, there is no interest in the property subject to seizure against the mortgagor; or after forfeiture.[3]

**§ 189. Modification of the rule as above stated, and the reason why the rule should not be sustained.**—Almost all the above decisions in the two preceding sections are founded upon an undecided case, which many courts have, without any investigation or knowledge of there ever having been any such decision, not only accepted as law, but have adopted and made it a rule in every State where it has been followed. The case of Cortelyou v. Lansing, 2 Caines, 200, supposed to have been decided by Chancellor Kent, in the year 1805, has been regarded and cited as the leading case upon

[1] Nichols v. Mead, 2 Lans. 222; Bacon v. Kimmell, 14 Mich. 201; Adams v. Tanner, 5 Ala. 740; Sexton v. Monks, 16 Mo. 156.

[2] Lyon v. Coburn, 1 Cush. 278; Brackett v. Bullard, 12 Met. 308.

[3] Herman on Executions, 154.

the effect of a chattel mortgage in regard to the title conveyed by it. That case was cited in Barrow v. Paxton,[1] 5 Johns. 258, when Chancellor Kent, then Chief Justice of the Supreme Court, made the following statement in regard to it: "THAT CASE (CORTELYOU V. LANSING) WAS NEVER DECIDED by this court. It was argued once, and I had prepared the written opinion which appears in the report of *Mr. Caines;* but the court directed a second argument, which, for some reason or other, was never brought on; so that no decision took place on the points in the case. How my opinion got into print I do not know. It was probably lent to some of the bar, and a copy taken, which the reporter has erroneously published as the opinion of this court."

The reasons for the principles in the opinion were founded upon the necessity of protecting the mortgagee, where he had neither possession of the mortgaged property nor the protection of the registry laws. In the case of a pledge, there never has been a doubt in regard to the pledgor's title and his right or equity of redemption, not only before and after condition broken, but until the pledgee had given due and reasonable notice that he would sell in default of payment. The pledgor's title is, and always has been, absolute until divested by sale or foreclosure; and if there are any cases where, without express agreement, a pledgee's title has been declared absolute after default, we have failed in discovering them. In the opinion of Chancellor Kent, he lays down the doctrine that, in case of a pledge, the legal title does not pass as in the case of a mortgage, "but that a mortgage is an absolute pledge, to become an absolute interest if not redeemed at a fixed time, and that delivery is necessary to a pledge. but a mortgage *may be* valid without delivery."

[1] See Cockcroft's Unabridged Table of Cases, vol. 1, page 492.

Prior to the enactment of the registry laws, and after the enactment of the statutes of frauds and fraudulent conveyances, no mortgage of goods and chattels was valid as against creditors and others, except when possession was delivered to the mortgagee. In the civil law the distinction in the two cases was, that in a pledge the title remained in the pledgor, while the possession was in the pledgee; in regard to mortgages, the title was in the mortgagee and the possession in the mortgagor. This was the civil and common law prior to the enactment of the statutes which provided for registration. The title was deemed to pass to the mortgagee, for the purpose of preventing the mortgagor from disposing of the property to innocent parties, and it became necessary for this purpose to divest his title. The Case of Twynne re-affirmed the rule of the civil law in the prevention of fraud and deceit, by compelling a mortgagee to take possession, in order to prevent innocent parties from being defrauded. The civil law deprived the mortgagor of title, the common law of possession, and thus the matter stood until the American courts commenced exercising their ingenuity in establishing exceptions to the rule in Twynne's Case, and establishing the doctrine that the validity of chattel mortgages did not depend upon the question of change of possession, where it was consistent with the instrument; the exceptions having rendered the rule in Twynne's Case almost obsolete. The registration laws were enacted with and for the express purpose of preventing the mischiefs which the civil and common law provided against, which resulted in the establishment of a different rule, that neither the title vested in the mortgagee, nor was a delivery of possession necessary where the recording acts are complied with. The protection of the mortgagee being thus provided for,

neither title nor possession pass to him under the registry acts, and therefore the decisions prior to the passage of said acts are now obsolete.

At common law after breach of condition in a mortgage, the mortgagor's title was absolutely divested and forfeited; that he was remediless; but equity, when it became firmly established, abolished that doctrine and established the rule that a mortgagor, no matter how express the agreement, would be allowed to waive his right of redemption or impair his power of exercising it, or transferring it to another; that all that was necessary was the payment of the debt, interest and costs, to cancel and discharge the lien. Taking the undecided case of Cortelyou v. Lansing for the leading case, we find the following cases sustaining the doctrine, that a mortgage vests the title in the mortgagee,[1] and that after breach of condition it becomes absolute at law; others, absolutely vested in the mortgagee; and that the mortgagor has no interest then subject to be levied on under execution against him;[2] and he may not only reduce the property

[1] Dean v. Davis, 12 Mo. 112; Haskins v. Patterson, 1 Edm. Sel. Cas. 122; Langdon v. Buel, 9 Wend. 80; Burdick v. McVanner, 2 Den. 170; Woodworth v. Morris, 56 Barb. 103; Patchin v. Pierce, 12 Wend. 61; Brown v. Bement, 8 Johns. 75; Winchester v. Ball, 54 Me. 558; Kannady v. McCarron, 18 Ark. 166; Wood v. Dudley, 8 Vt. 434; Holmes v. Bell, 3 Cush. 322; Heyland v. Badger, 35 Cal. 404; Dungan v. Mut., &c., Co., 38 Md. 242; Peters v. Ballistier, 3 Pick. 495; Homes v. Crane, 2 Pick. 610; Moore v. Murdock, 26 Cal. 514; Brackett v. Bullard, 12 Met. 308; Talbot v. Deforest, 3 Ia. 586; Bryant v. Carson, &c., 3 Nev. 313; Hall v. Sampson, 35 N. Y. 274; Flanders v. Barstow, 18 Me. 357; Montgomery v. Kerr, 1 Hill (S. C.) 291; Ferguson v. Clifford, 36 N. H. 86; Jewett v. Preston, 27 Me. 400; Robinson v. Lewis, 2 Jones Eq. 25; Kea v. Council, 2 Jones Eq. 345; Bragleman v. Dane, 15 Alb. Law D. 289.

[2] Phillips v. Hawkins, 1 Branch, 262; Lull v. Mathews, 19 Vt. 322; Frische v. Kramer, 16 Ohio, 125; Flanders v. Barstow, 18 Me. 357; Constant v. Matteson, 22 Ill. 546; Duppee v. Grinnell, 69 Ill. 371; Langdon v. Buel, 9 Wend. 80; Patchin v. Pierce, 12 Wend. 61; Pledger v. Mandeville, 1 Brev. 296;

to actual possession,[1] but some of the courts go still further, and attempt to establish the principle that this *absolute* title of the mortgagee which vests in him cannot be divested even by payment or tender of the money.[2]

If such be the law, what is a chattel mortgage? What right has a mortgagor, after one executing the mortgage? The mortgagee, within fifteen minutes after its execution, may, if he chooses, feel himself unsafe or insecure, in accordance with the conditions of the mortgage, take possession of the property, and that is all there is to the transaction. The mortgagor is helpless; he has no title, no redemption, no rights whatever. Such decisions result from the principle of *stare decisis*. But mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice. The maxim, *communis error facit jus*, has a limited application. Otherwise it never could be said, *the law is the perfection of reason*, and that it is the *reason*

Robinson v. Campbell, 8 Mo. 365; Thornhill v. Gilmer, 12 Miss. 153; Burdick v. McVanner, 2 Den. 172; Fuller v. Acker, 1 Hill, 475; Smith v. Acker, 23 Wend. 667; Case v. Boughton, 12 Wend. 62; Gates v. Smith, 2 Minn. 31; Eddy v. Caldwell, 7 Minn. 225; Judson v. Easton, 58 N. Y. 664; Parshall v. Eggart, 52 Barb. 367; Heyland v. Badger, 35 Cal. 404; Wright v. Ross, 36 Cal. 414; Freeman v. Freeman, 2 Green (N.J.) 44; Winchester v. Ball, 54 Me. 558; Brown v. Phillips, 3 Bush, 656; Johnson v. Houston, 47 Mo. 227; Porter v. Parmly, 43 How. Pr. 445; Nichols v. Webster, 1 Chand. (Wis.) 203; Hill v. Robinson, 24 Miss. 368; Dane v. Mallory, 16 Barb. 46; Bell v. Shrieve, 14 Ill. 462; Mattison v. Bancus, 1 N. Y. 295; Butler v. Miller, 1 N. Y. 496; Stewart v. Taylor, 7 How. Pr. 251; Ackley v. Finch, 7 Cow. 290; Brown v. Bement, 8 Johns. 96.

[1] Patchin v. Pierce, 12 Wend. 61; Green v. Dingley, 24 Me. 131; Burton v. Tannehill, 6 Blackf. 470; Porter v. Parmly, 43 How. Pr. 445.

[2] Eddy v. Caldwell, 7 Minn. 225; Boone v. Rains, 7 Mon. 384; Brown v. Lipscomb, 9 Port. 472; Brown v. Bement, 8 Johns. 96; Patchin v. Pierce, 12 Wend. 61.

and *justice* of the law which gives to it its vitality. When we consider the thousands of cases in the American and English reports which have been doubted, overruled or limited, we can appreciate the remark of Chancellor Kent,[1] that "*even a series of decisions are not always evidence of what the law is.*" "Precedents are to be regarded as the great storehouse of experience; but not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although at times they be liable to conduct us to the path of error, yet may be important aids in lighting our footsteps in the road to truth."[2] From an examination of the case of Barrow v. Paxton, Fifth Johnson Reports, 260, it appears that the leading case, as reported, in which the doctrine originated, was never decided, and in the cases in which it has been followed, it appears to have been followed with little or no inquiry into the reason or justice of its application. The rule there said to have been laid down, while it might have been applicable prior to the time when chattel mortgages became a security, governed and regulated by statute and the registration laws, has been so far modified and overruled by legislation and reason, that it has become obsolete. A rule which, in its tendency, is calculated to foster bad faith and defeat the purposes of justice, ought not to be adhered to simply on account of its antiquity. Such we regard the rule, "after the condition is forfeited, the mortgagee has an absolute title in the thing mortgaged."

§ 190. In the light of the decisions cited above in regard to the effect of a breach of condition or default it will hardly be contended that there is not a great preponderance of authority in favor of the rule above set forth. Notwith-

[1] 1 Kent, 477.

[2] Leavitt v. Morrow, 6 Ohio St. 72.

standing the array of decisions, there is neither justice, law, equity or reason in the rule, and, therefore, that it is not sound law on principle, the rule results from the undelivered opinion written for the case, of Cortelyou v. Lansing, which has been followed not only in New York, but in Ohio, Minnesota, California, Missouri and other States having a reformed code, similar to that of New York, and which States adopt the New York decisions upon the doctrine of *stare decisis*. The most singular circumstance attending the adoption of this doctrine is the effort to sustain it upon the rule *stare decisis*. The principle *stare decisis*, adopted by courts in order to give stability to private rights, and to prevent the mischiefs incident to mutations for light and insufficient causes, is doubtless a wholesome rule of decision when derived from legitimate and competent authority, and when limited to the necessity which shall have demanded its application; but, like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity. Such an application of this rule must be necessarily to fasten upon justice, upon social improvement and happiness, the fetters of ignorance, of wrong and usurpation. It is a rule which, whenever applied, should be derived from a sound discretion, a discretion having its origin in the regular and legitimate powers of those who assert it. While *stare decisis* is a safe rule in many instances, and courts are compelled to adhere to it, whether just or unjust, in particular cases, the rule itself should emanate from, and be established by, a court of last resort.

We have shown it to be a well settled principle of equity that a mortgage is a mere security and in many States a rule of law that has become fixed in regard to

land, and no court in England or America would dare lay down or depart from this rule and say that when there is a breach of condition the mortgagee's title becomes absolute and the mortgagor is remediless. Why a mortgage in one case should be a mere security, a mere preferred lien, a pledge of specific property for the satisfaction of a debt in case of default in payment, and in another the same instrument made, executed and delivered in the same manner and with the same effect, should convey an absolute title is an anomaly. In the case of a mortgage of land, there is no question of the mortgagor's right or equity of redemption until foreclosure and sale, and no question but what it may be levied on and sold under an execution, assigned, or mortgaged by the mortgagor. But in a mortgage of personal property there is to be an entire change of reason, rule and principle; because an unfortunate debtor is in default one hour after the law-day of the mortgage expires, he is remediless, he not only loses his property, but payment, or tender within twenty-four hours after breach is fruitless, he has no redress at law. But take the case upon principle. A executes a mortgage to B to secure a note for a limited amount, giving a mortgage upon property worth five or ten times the amount borrowed. He has other creditors, but from some unavoidable accident fails to meet his interest or taxes, and in consequence of this breach he has lost his property unless he brings a bill to redeem in equity; none of his creditors may assist him nor redeem the property; the only person who has any right is the mortgagor after forfeiture, and at law he has no remedy but must resort to a court of equity. The courts holding this doctrine compel a mortgagor to bring his bill in equity to redeem in a case of this kind, they compel what the policy of the law is designed

to prevent, litigation. The question as to the rights of the mortgagor does not seem to enter into the decision of this question. The trouble is in following the decision in some obsolete case simply because some court so decided almost a century since. No one ever heard of a case where a pledgee upon default was allowed to treat the property pledged in his possession as his own against the will of the pledgor, the law from the earliest time to the present compels a sale in order to obtain satisfaction of the debt and makes the pledgee liable for any surplus and the pledgor liable for any deficiency.

What is a mortgage but a pledge without possession. Such it was in the civil law, such it is now. It is true that Chancellor Kent, once wrote an opinion on pledges which was published as a decision of the court, but the case never was decided nor was any such opinion ever delivered. Still the courts have, without any investigation of the matter, been quoting that case as a precedent for almost a century, and they quote it simply because it was said to have emanated from Judge Kent, and the result is that there are a long line of decisions which have established the principle that a mortgagee, after breach of condition, acquires an absolute title at law; but when we come to examine what the absolute title is, there is no definition of it in any of the books. "An absolute title," for what? There is no case, nor can there be any, without violating every principle of right, of justice and equity, which goes so far as to vest an absolute title in the mortgagee of a mortgagor's property, allowing such mortgagee to use it as his own absolutely and unconditionally. Still it is laid down that his title is "absolute;" it is absolute, and absolute in the same sense that a sheriff's is under an execution, to dispose of it, to sell it for the purpose of satisfying the debt from

the proceeds of the sale; as well might the courts say that a sheriff should transfer the property levied on by him to the creditor, or that in a mortgage of real estate the title vests absolutely after forfeiture. Courts would scout such a doctrine and declare it an affront to common sense. A mortgagee has an absolute right to cause the sale of the mortgaged property to satisfy his debt; that is all the absolute title he has; and he has the absolute right to complete the contract of hypothecation by causing it to be sold for the satisfaction of his debt; when he gets his debt, interest and costs, his absolute legal title has been divested and that is all the law, justice or equity, intends he shall have.

§ 191. **Of the Mortgagor's Interest or Right of Redemption.**—By the early Roman law, the debtor and creditor might agree that if the debtor did not pay the debt within a specified period, the property should be forfeited, and should become the absolute property of the creditor. But a law of Constantine prohibited such contracts, on the ground that they were unjust and oppressive to debtors, and declared that every agreement should be null and void which provided that the thing pledged should pass to the creditor without any sale or appraisement, or that the debtor should forfeit his right of redemption if he fail to pay at the proper time.[1]

The law of Constantine has been engrafted in the French law and the modern law of Continental Europe. "The creditor can not," observes Domat, "stipulate that, if he is not paid at the time appointed, the things pledged shall become his own property; for such an agreement would be *contra bonos mores;* for the pledge or hypothecation is given to the creditor only as security for the debt,

[1] Cod. Lit. 8, Tit. 35, Lex. 3.

and not to enable him to profit by the indigence of his debtor." This rule of the civil law has been universally adopted in regard to pledges or mortgages of land and the pledgor or mortgagor has been, not only by the courts of chancery who first adopted the civil law rules, but by courts of law, regarded as the owner, and that his interest can be taken from him only by judicial process or proceedings equivalent thereto. A court of equity never favors forfeitures, neither does a court of law; and upon the principle that "once a mortgage always a mortgage," a mortgagor may, after forfeiture or after the time when the courts declare that the mortgagee's title is absolute, by a tender of the full amount of principal, interest and costs, before his right of redemption is foreclosed, divest the mortgage lien and can enforce a redemption in equity or a redelivery of possession at law. A mortgage of chattels like a mortgage of land, is a mere security, and it is the duty of courts of equity to relieve against the forfeiture in one case as well as the other on payment of the debt, interest and costs. A mortgagor can bring an action to redeem, and a mortgagee may have a corresponding one to foreclose, though, in general, a sale of the property upon reasonable notice to the mortgagor to redeem is equally effective as a resort to judicial proceedings.

Relief in equity will always be granted *ex æquo et bono*, especially in case of forfeitures, but only on payment of the whole debt. In order to get rid of this equity of the mortgagor, the mortgagee must either sell in the manner provided in the mortgage, the statute, or under judicial process. A sale, if made under a power in the mortgage or in accordance with the statute requiring it to be made after notice to the mortgagor, must be fair and *bona fide* or the mortgagor's equity of redemption will not be extinguished. An enormous sacrifice of property will

not be tolerated, and the mere taking possession by the mortgagee without sale will not vest the absolute title in him, although there is a long line of decisions supporting the doctrine that the mortgagee's title is absolute after default; it is *contra bona mores.* There is no distinction between a mortgage of real estate and one of personal property in this respect; until the mortgagee renders his security available, applying the proceeds to the satisfaction of his debt; the right of redemption exists in the mortgagor and, as long as it exists, it is subject to levy and sale on final process.

The doctrine that a mortgagee can, after breach of condition has occurred, obtain an absolute title is utterly antagonistic to the nature of a mortgage, and had its origin in the time when a valid mortgage or encumbrance could be made only upon an actual change of possession and prior to the establishment of the equitable powers of courts. Courts of equity, in the application of the principles of natural right and reason, in the actual administration of justice, have mitigated the rigor of the law by a liberal and rational interpretation of its rules and the result has been the establishment of a doctrine which must become the only one by which the rights of the debtor, as well as the creditor, shall be protected. Where a contract is made that a certain portion of a debtor's property may, in case of default in payment, be made available in satisfaction of the debt, while the remedy is complete in equity it must be at law as there can not be, for any length of time, any distinction between law and equity. It cannot, therefore, be an unwarrantable assumption that until the creditor subjects his security to the satisfaction of his claim that he shall be regarded, either in law or equity, as having any other or greater rights than any secured or lien creditor, if he neglects to render it available by not proceeding

against it. The law should not divest his debtor of a title which he himself refuses or neglects to perfect, and, therefore, he should be in no better condition than any other lien creditor, having no rights as against his debtor but such as may be enforced by due course of law.

**§ 192.** There is no question but what the interest of a mortgagor is liable and subject to sale on execution prior to default or breach of condition, and, as stated, it should be until foreclosure. The rule that the mortgagee's title is absolute after default is not so uniform as might be expected from the cases cited in the preceding sections. The title of the mortgagee after default is no greater until foreclosure than it was before. The mortgagor has a right of redemption until his right is taken from him by a decree of a court, a statutory foreclosure or a sale under a power in the mortgage, or under an execution issued on a judgment for the mortgage debt.[1] In a mortgage of personal property although the prescribed condition has not been fulfilled there exists, as in mortgages of real

[1] Farmers' Bank v. Cowan, 2 Keyes, 218; West v. Crary, 47 N. Y. 423; Hindman v. Judson, 13 Barb. 629; Porter v. Parmly, 52 N. Y. 188; Smith v. Coalbaugh, 21 Wis. 427; Van Brunt v. Walkalee, 11 Mich. 177; Landers v. George, 49 Ind. 309; Coe v. McBrown, 22 Ind. 252; Lines v. Sandlin, 44 Ind. 504; Doane v. Garrettson, 24 Iowa, 351; Tucker v. Wilson, 1 P. Wms. 261; Osgood v. Pollard, 17 N. H. 271; Moore v. Aylett, 1 H. & M. 29; Patchin v. Pierce, 12 Wend. 61; Lockwood v. Ewer, 9 Mod. 275; Dame v. Mallory, 16 Barb. 46; Leighton v. Shapely, 8 N. H. 361; Wendell v. N. H. Bank, 9 N. H. 420; Leach v. Kimball, 34 N. H. 473; Long Dock Co. v. Mallory, 1 Beas. 96; Gilchrist v. Patterson, 18 Ark. 579; Constant v. Matteson, 22 Ill. 559; Nichols v. Webster, 1 Chand. 203; Flanders v. Thomas, 12 Wis. 410; Kouns v. Shafer, 23 Md. 83; Kemp v. Wesbrook, 1 Ves. 278; Hart v. Ten Eyck, 2 Johns. Ch. 100; Wenderzee v. Willis, 3 Bro. C. C. 21; Harrison v. Hart, Com. 392; Cutts v. York Manf. Co., 18 Me. 201; Domendary v. Metcalf, Pre in ch, 149; Saxton v. Williams, 15 Wis. 292; Foster v. Armes, 2 B. R. 147; Doane v. Russell, 3 Gray, 384; DeLisle v. Priestman, 1 Brown, 176; Parker v. Branker, 22 Pick. 46.

property, an equity of redemption which may be asserted by the mortgagor if he seeks to enforce his right within a reasonable time.[1] The following cases establish the doctrine that after forfeiture the mortgagor's right of redemption exists. In South Carolina a mortgagor may redeem within two years after delivery of possession to the mortgagee.[2] In Virginia it is held that even after a sale on execution for the debt secured by mortgage, the mortgagor does not lose his right of redemption on the ground that such proceeding is no foreclosure.[3] In the New England States, in order that the sixty days given by statute for redemption after breach of condition shall begin to run, the mortgagee must give the mortgagor notice of his intention to foreclose.[4] In Mississippi, where the administrator who is in possession delivers the property to the mortgagee, the right of redeeming still remains and passes by an administrator's sale.[5] In Kentucky, where a mortgage is given and afterwards a bill of sale is substituted, parol evidence is admissible to contradict the bill of sale, and the mortgagor will be allowed to redeem.[6] In Arkansas the doctrine is that a mortgage is a mere security and only a chattel interest, and that, until a decree of foreclosure, the mortgagor continues the real owner. The equity of redemption is considered the real and beneficial estate tantamount to the fee at law.[7] And where the mortgagee claims to be the absolute owner (in accordance with the rule in many States, after default), the

[1] Cutts v. York Mfg. Co., 18 Me. 201; Tucker v. Wilson, 1 Swin. 261; Dame v. Mallory, 16 Barb. 46; Doane v. Russell, 3 Gray, 384; De Lisle v. Priestman, 1 Browne, 176; Hart v. Ten Eyck, 2 Johns. Ch. 100; Parker v. Branker, 22 Pick. 46; Lockwood v. Ewer, 9 Mod. 275.

[2] Wurtz v. Heynes, 2 Hill Ch. 171.

[3] Dabney v. Green, 2 H. & M. 101.

[4] Trask v. Pennell, 59 Me. 419.

[5] Phillips v. Hunter, 22 Miss. 485.

[6] Cook v. Colyer, 2 B. Mon. 71.

[7] Hannah v. Carrington, 18 Ark. 85.

mortgagor need not even tender the amount due on the mortgage before bringing suit to redeem,[1] and if he brings a bill to redeem he must pay the necessary expenses incurred in keeping the property in addition to the debt and interest.[2] In Alabama the right of the mortgagor to redeem is recognized to exist years after forfeiture, and may be foreclosed by lapse of time. Thus, where the mortgagee was in continued possession of the property for six years after the default, without any recognition of the mortgagor's rights, it justified an application by analogy of the Statute of Limitations, and bars the mortgagor's right to redeem, notwithstanding the mortgagee had a right to possession until the debt was paid.[3] In many of the New England States there is a statutory provision giving a mortgagor a right of redemption after default or forfeiture for the period of sixty days after the mortgagee gives him notice of his intention to foreclose. The sixty days' limitation does not commence running from the day of default, it requires an intention on part of the mortgagee to render his security available for the satisfaction of his debt. After the xpeiration of the sixty days the mortgagee's title becomes absolute; payment or tender of payment will not revest title in the mortgagor.[4] A similar rule obtains in New Jersey,[5] notwithstanding the statutory provisions. Equity will compel a redemption if the proceedings are commenced within a reasonable time.[6]

The principle which apparently seems to have been well settled that a mortgagee's title is absolute after default means but little when applied to cut off the mortgagor's right of redemption, and in no rule of law has

[1] Watts v. Johnson, 4 Tex. 311.
[2] Webb v. Patterson, 7 Humph. 431.
[3] Byrd v. McDaniel, 33 Ala. 18.
[4] Clapp v. Glidden, 39 Me. 448; Winchester v. Ball, 54 Me. 558; Trask v. Pennell, 59 Me. 419.
[5] Freeman v. Freeman, 2 Green's Ch. 44.
[6] Flanders v. Barstow, 18 Me. 357.

there been a greater change than in this; and it is the establishment of this right of redemption after forfeiture, and extending it until foreclosure, that assimilates mortgages of real and personal property. The notion that a mortgagee's possession, whether before or after default, enlarges his title, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor rests on no foundation. It may be called a just and lawful possession, like the possession of any other pledge, but when its object is accomplished it is neither just nor lawful for an instant longer. There are terms of the ancient law which have come down to us having long survived the principles of law of which they were once the appropriate expression. Thus, the words "law-day" once, and very expressively, marked the time when all legal rights were lost and gone by the mortgagor's default. There is now no such time until foreclosure; but the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default, and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive, and are in use, although the ideas they once represented have become obsolete. Even the word "forfeiture," still so often used, is no longer in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgagor's title. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the

manner prescribed by the statute law, or if he has himself in the contract given authority to sell; but until foreclosure, his title, the day after default, is exactly what it was the day before. So that the title of the mortgagor is just the same as it was the day the mortgage was executed. He continues the owner of the property, and holds it subject to the lien of the mortgage. He may sell, encumber, demise, or convey the mortgaged property, or it may be taken on process against him, until his title is barred by foreclosure; but a mortgagee cannot thus act with the property, it is not liable for his debts; he can neither sell, convey, or encumber it. He has no title which is transferrable, his mortgage is a mere *chose* in action. He may assign the debt, but that draws the security with it; he may assign the mortgage without the debt, but that conveys no interest or right to the property. All the rights follow the debt; whenever that is paid, that extinguishes the security, and therefore a mortgagee obtains no title until after foreclosure. Lord Mansfield said it was an affront to common sense to say that the mortgagor was not the real owner.[1]

As the title or interest of the mortgagor in the property mortgaged, after the execution of the mortgage, but specially after default, has been so generally termed an equity of redemption, and so universally regarded by courts of law and equity, we will ascertain what an equity of redemption is, and then where and how it may be made available. Redemption is an equitable process by which a mortgagor, or other person interested in personal or real property subject to a mortgage or encumbrance, may recover the absolute ownership thereof, upon certain terms which are usually the payment of the principal amount due, with

[1] King v. St. Michaels, Doug. 630.

interest thereon, and the costs of the mortgagee. Foreclosure is (as to redemption) the converse and generally the reciprocal remedy,[1] whereby the mortgagee or other person entitled to the benefit of a mortgage, or encumbrance, may acquire an absolute title to the encumbered property upon non-payment, by the person entitled to redeem, of the amount secured thereof with interest and costs. Wherever there is a right to foreclose there must of necessity be a right to redeem, because foreclosure is in default of redemption.

**§ 193. Equity of Redemption.**—An equity of redemption is the right which the mortgagor has of redeeming his property after it has been forfeited at law for the non-payment of the mortgage debt, or money secured by the mortgage, at the time stipulated and agreed upon by such mortgage, by paying the amount of the debt, interest, and costs. It is the mere creature of a court of equity, founded upon the principle, that as a mortgage is nothing but a pledge for the purpose of securing the payment of the amount for which the mortgage is given to the mortgagee, the ownership of the property being considered, upon principles of equity and justice, to be in the mortgagor, subject only to the legal title of the mortgagee as far as such title may be necessary for his security. But where a mortgage is made to defraud creditors, it is, as to them, void, and creates no equity of redemption liable to be sold on execution. In order that there may be an equity of redemption, there must be a valid mortgage. In the United States, equities of redemption are, almost as a universal rule, made subject to legal process for the debts of the mortgagor. This liability is a necessary result of the

[1] Lonquet v. Scawen, 1 Ves. 453; King v. Meighen, 20 Minn. 264.

principle generally adopted in the United States, that the mortgagor, until foreclosure, and as regards third persons, remains the owner of the property, the mortgage being a mere lien, which is not subject to legal process. Property mortgaged is made subject to execution, because it is generally mortgaged for less than its value, and the right of redemption is a valuable interest. It is the proper way to reach a mortgagor's interest in property encumbered, as a security for a debt, and when taken the whole of the mortgagee's interest or title is taken from him.[1]

**§ 194. How long the right of discharging the mortgage lien exists.**—In our examination of the cases wherein the rights of mortgagor and mortgagee are examined by courts, we have found none, since the establishment of an equity or right of redemption, that vests in the mortgagee, after default or breach of condition, such an absolute dominion or ownership over the property that he can dispose of it at pleasure, treating it as his own, regardless of the rights of the mortgagor; but the decisions are decidedly opposed to any such doctrine, and if there ever were any such decisions they have long since become obsolete; and even where the mortgagor, in accordance with the terms of the instrument, delivers possession of the property to the mortgagee after breach of condition, it will not vest the absolute ownership in the mortgagee or free it from the mortgagor's right of redemption, and therefore until the mortgagee, by legal

[1] Herman on Executions, § 140.

[2] Landers v. George, 49 Ind. 309; Freeman v. Freeman, 2 Green (N. J.) 44; Covell v. Doloff, 31 Me. 104; Bryan v. Roberts, 1 Strobh. Eq. 134; Glass v. Ellison, 9 N. H. 69; Lucking v. Wesson, 20 Mich. 443; Van Brunt v. Walkalee, 11 Mich. 177; Gay v. Bidwell, 7 Mich. 519.

notice and sale of the goods, or by a judicial foreclosure and sale of them, cuts off the equity of redemption, it is liable to seizure and sale by the creditors of the mortgagor.[1] The mortgagee, or his assignee, occupies the relation of a creditor secured by lien, and any holder of a subsequent lien may pay off the prior encumbrance to prevent his own lien from being cut off.[2] If the mortgagee desires to extinguish the right of redemption, he must do it by foreclosure. If the mortgagee take and retain possession of the mortgaged property (except where the statute establishes the time for redemption), the property is always liable to redemption. When the mortgagee's debt is satisfied, his title ceases;[3] and before the right of redemption is barred, the mortgagor has an assignable interest.[4] Until it does become barred, the mortgagee's title cannot become absolute, nor can he appropriate the property in payment of his debts; and until his title is perfected the law will not so appropriate it.[5] The payment, or tender of payment, after the condition of the mortgage is broken, at any time before the mortgage is foreclosed, is equivalent to payment or tender at the day mentioned in the condition, and the property is thereby discharged of the incumbrance.[6] The courts in this respect follow the civil and continental law, where it is said to be the natural effect of an hypothecation, "that if the debtor does not pay, the creditor may sell and obtain payment out of the price or market value of the thing

[1] Coe v. McBrown, 22 Ind. 252; Lines v. Sandlin, 44 Ind. 504; Landers v. George, 49 Ind. 309; Stoddard v. Dennison, 7 Abb. Pr. N. S. 509; Porter v. Parmly, 43 How. Pr. 445.

[2] Lucking v. Wesson, 25 Mich. 443; Chapman v. State, 5 Oregon, 432.

[3] Freeman v. Freeman, 2 Green (N. J.) 44.

[4] Moody v. Ellerby, 4 S. C. 21.

[5] Covell v. Doloff, 31 Me. 104.

[6] Swett v. Horn, 1 N. H. 382; Caruthers v. Humphrey, 12 Mich. 270; Hartley v. Tatham, 26 How Pr. 158; Jackson v. Crofts, 18 Johns. 110; Farmers, &c. Co. v. Edwards, 26 Wend. 541.

hypothecated." The debtor may, at any time after the time limited for payment of the debt has expired, and before the property has been sold, or his right of redemption has been foreclosed, release the property and obtain an extinguishment of the charge, by paying or tendering to the mortgagee, or his assignee, the amount of the debt, interest, etc. If a portion of the mortgaged property has been sold with the mortgagor's consent, and the proceeds applied towards the satisfaction of the debt, the mortgagee may redeem the residue;[1] if it sells for enough to satisfy the debt and interest, that will discharge the mortgage, and the mortgagor will be entitled to the residue of the property.

§ 195. The title of a mortgagee, on default, cannot become so far absolute as to deprive the mortgagor of all his right or interest in the property. In those States where it is held, that upon default the title is perfected in the mortgagee, the doctrine is also well settled, that the mortgagor, in equity, has his right of redemption, and the "absolute title" which it is held that the mortgagee acquires, which is so constantly used by the courts, is an absolute legal title, and that, notwithstanding default, there is a right, or, as it is called, an equity of redemption remaining in the mortgagor.[2] In order, therefore, to divest or dispose of this right of redemption, the mortgagee may go into a court of equity and compel a speedy redemption or to foreclose the right. The same object may be obtained by a fair public sale of the property, on due notice to the mortgagor. These are

[1] Locke v. Palmer, 26 Ala. 312.

[2] Charter v. Stevens, 3 Denio, 35; Patchin v. Pierce, 12 Wend. 62; Fuller v. Acker, 1 Hill, 475; Stoddard v. Dennison, 7 Abb. Pr. N. S. 309; Pulver v. Richardson, 3 Thomps. & C. 436.

familiar principles, and apply wherever the relation of mortgagor and mortgagee of personal property exists.[1] The right to redeem may be foreclosed without judicial proceedings, by a sale of the property, as in the case of a pledge, upon reasonable notice to the mortgagor, and possibly by lapse of time. There is no distinction in the right to sell, between the case of a pledge and a mortgage of personal property. If the sale is *bona fide* and reasonably made, it will be equally as effective in barring the mortgagor's right of redemption as a foreclosure in a court of chancery. The sale should be at public auction, as private sales are contrary to law. If the mortgagee resorts to none of the remedies provided for extinguishing the equity of redemption, it is clear that the mortgagor may assert his right in equity to redeem. The right continues until the property is sold; an unfair or fraudulent sale of mortgaged property will not defeat or extinguish the equitable rights of the mortgagor. The mortgagee has no right by unfairness to sacrifice the property and deprive the mortgagor of a surplus over the debt which, by an openly conducted sale might arise. His "absolute legal title" does not enable him to deal with the property as if it were his own. The only method by which to ascertain how the mortgagor's right to redeem is to be made available, is by analogy to mortgages of real property. There is no direct authority to guide. While there is plenty of *dicta* in the books, there is no case where there is a direct decision upon the right to redeem; but if the mortgagee sells the property he is accountable to the mortgagor for the surplus after the

[1] Langdon v. Buel, 9 Wend. 80; Patchin v. Pierce, 12 Wend. 61; White v. Cole, 24 Wend. 142; Conrad v. At. Ins. Co., 1 Pet. 440; Hart v. Ten Eyck, 2 Johns. Ch. 110; Tallman v. Smith, 39 Barb. 390.

debt and all expenses are paid.[1] It has been said, that wherever there is a mortgage or pledge of goods, the party may take his remedy in equity.[2] It is not, however, a general rule that a person may come into equity for the redemption of personal chattels, for upon tender of the money an action at law may be brought for the chattels; but there may be a right to sue in equity, because it may be necessary to take an account of what is due on the security, as where the plaintiff is the assignor of the mortgagor and therefore a stranger to the amount due.[3]

**§ 196. The Mortgagor is entitled to the same Rights at Law as in Equity. Reason why there should be no distinction between the two courts.**— It is well settled that after default and before foreclosure a mortgagor has an equity of redemption which can be made available only in a court of equity. In the early history of the law of mortgage, the courts of equity departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine, that a mortgage was but a pledge or security always redeemable until foreclosure. The courts of law followed in the same direction. The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and

[1] Charter v. Sullivan, 3 Den. 33; Bryan v. Roberts, 1 Strobh. Eq. 342; Hindman v. Judson, 13 Barb. 629; Pettibone v. Perkins, 6 Wis 616.

[2] Ryal v. Roberts, Barn. Ch. 38.

[3] Ratcliff v. Davis, 1 Bulst. 29; Kemp v. Wesbrook, 7 Ves. 278; Slade v. Rigg, 3 Hare, 35; Hart v. Ten Eyck, 2 Johns. Ch. 62; Boston, &c. Works v. Montague, 108 Mass. 248. So when A executes a mortgage and delivers possession to B, who mortgages the property to C, to secure several loans, and delivers the possession to C, A will be allowed to redeem against C. Demandbray v. Metcalf, 2 Vern 690.

the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next, such pre-eminently has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed and rational law is made by it. In this, equity is synonomous to justice, in that, to the true sense and interpretation of the rule. But the very terms of a court of equity and a court of law, as contrasted with each other, are apt to mislead us; as if one judged without equity, and the other was not bound by any law, whereas every definition or illustration to be met with which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree. It is said that the business of a court of equity is to abate the rigor of law. But no such power is contended for. In all cases of positive law, the courts of equity as well as the courts of law must say with Ulpian, "*hoc quidem per quam duram est, sed ita lex scripta est.*"

It is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound and equally profess to interpret statutes according to the true intent of the legislature. There is not a single rule for interpreting laws, whether equitably or strictly, that is not equally

used by the judges both of law and equity; the construction must in both be the same, or, if they differ, it is only as one court of law may happen to differ from another. Each endeavors to adopt and fix the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title. It is said that fraud, accident and trust are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable in a court of law. Many accidents are also supplied in a court of law, and there are trusts which are cognizable in a court of law.

It is said that in order to give the proper jurisdiction to a court of equity that the complainant has no remedy at law, but he who should, for this reason, conclude that no cause is tried in equity where relief might be had at law, and at the same time examines the extent and variety of the cases in the equity reports, must think that the law is a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are or should be exactly the same; both ought to adopt the best or must cease to be courts of justice. The true construction of securities for money lent was a fountain of jurisdiction in courts of equity when they held the penalty of the bond to be the form, that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundations of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to all kinds of mortgages. The mortgagor continues owner of the property, the mortgagee the owner of the money lent upon it; their ownership is mutually transferred, and the mortgagor is barred from redemption in accordance with the statutory provisions, analogous to the statute of lim-

itations, unless his equity is foreclosed by sale, under a power in the mortgage, by statutory foreclosure, or by decree of a court of competent jurisdiction. Courts of law did not place the same construction upon such transactions, and the inconvenience and injustice resulted in the enactment of a law placing the same construction upon such instruments in courts of law as was placed upon them in courts of equity, so that the rule at law and equity is now the same. The only difference that there is between courts of law and equity is in the different modes in administering justice in each—in the mode of proof, the mode of trial, and the mode of relief. But there cannot be a greater solecism than in two sovereign and independent courts in the same country, exercising concurrent jurisdiction, and over the same subject matter, that there should exist in a single instance two different rules of property, clashing with or contradicting each other.

In regard to the principles which are applicable to transactions in the nature of *gage* or pledge there should be no difference between law and equity, and there is no reason why courts of law and equity should make any distinction in regard to the enforcement of this right of redemption. While a mortgagor may file a bill to redeem in equity, he may, after the mortgagee has taken possession, bring an action to recover possession of the property where he makes a tender of the debt and interest and costs if there are any. There are cases which hold that after breach of condition or default no act of the mortgagor will re-invest him with the title except payment duly accepted by the mortgagee. The principles upon which such decisions are founded are neither legal or equitable. That a right of redemption exists, after default, in the case of a chattel mortgage as well as a mortgage of real

estate is too well settled to be now questioned; if that right exists until foreclosed by sale, under a power in the instrument, or in accordance with a statutory provision, or by decree of foreclosure, a mortgagee's title cannot become absolute as long as it exists. Therefore all that is necessary, after default and before the right of redemption is foreclosed, is for the mortgagor to pay the mortgagee if he accepts, that releases the property; or if he refuses to accept, to make a good and sufficient tender of the amount due and the tender will release and discharge the lien. The payment or tender of payment to the mortgagee or his assignee, at any time before foreclosure, after condition broken, will discharge the lien of a mortgage,[1] as it is equivalent to payment or tender at the day mentioned in the condition; and if the mortgagee be in possession he may, after such tender, be ousted by the mortgagor. The mortgagor can recover possession of the property for the lien of the mortgage is satisfied. A court of law should not allow a mortgagee to take any undue advantage any more than a court of equity would; if, therefore, a mortgagor may enforce his right of satisfying the mortgage after default and before foreclosure, by a bill in equity, he has a remedy at law, where the mortgagee is in possession, by recovering possession of the property; or if the mortgagor is in possession after default and tender refused, the lien of the mortgage will

[1] Arnot v. Post, 6 Hill, 65; Kemble v. Wallis, 10 Wend. 374; Coit v. Houston, 3 Johns. Cas. 243; Hunter v. Le Conte, 6 Cow. 728; Coggs v. Bernard, 2 Ld. Raymd. 909; Jackson v. Crofts, 18 Johns. 110; Edwards v. Farmers, &c. Co., 21 Wend. 467; Kortright v. Cady, 21 N. Y. 343; Fuller v. Parish, 3 Mich. 211; Moynahan v. Moore, 9 Mich. 9; Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Kanouse, 13 Mich. 303; Walter v. Smith, 5 B. & A. 439; Kemp v. Westbrook, 1 Ves. 278; Demandray v. Metcalf, 2 Vern. 691; Vanderzee v. Willis, 3 Bro. 21; Ratcliffe v. Davis, Yelv. 178; Rex v. Morrison, 28 L. J. M. C. 210; Legro v. Lord, 10 Me. 161; Swett v. Horn, 1 N. H. 332.

be discharged, but the debt will remain;[1] the mortgagee will be left to his remedy against the mortgagor in the same manner as any unsecured creditor.

A mortgagee is not regarded in equity as having the legal title, but as holding it merely as collateral security;[2] it is only in order that he may enforce his rights, that he is regarded as having a title to the property. It is simply a method by which he is enabled, in a shorter time, to enforce the payment of his debt; it simply gives him the right to seize and sell, but not appropriate it in any other manner, and this is the extent of the title that a mortgagee acquires after default. Such being the mortgagor's right, any subsequent mortgagee, or any purchaser, or execution creditor may enforce this right of redemption. The right of a junior mortgagee to redeem from the senior mortgagee, by paying his debt with interest and costs, is an equitable right founded on common law principles, and is entirely independent of the statutory right of redemption given to judgment creditors.[3] This right or privilege of discharging and satisfying the mortgage, which is ordinarily known as an equity of redemption, may be, in many instances, of more value to a creditor or even the mortgagor, than the amount for which the property is pledged as security; the property may be pledged for one-tenth its actual cash value, and to say that a creditor shall take advantage of an unfortunate debtor simply because he is in his power, and obtains an absolute title to the mortgaged property is monstrous, and the position untenable. Courts affirming this doctrine do not carry it out; it is in fact a legal myth, there is nothing

[1] Mohn v. Stoner, 11 Iowa, 30; Haynes v. Thorn, 28 N. H. 386; Donner v. Sinclair, 15 Vt. 495; Hill v. Place, 7 Robt. (N. Y.) 389.

[2] Bryan v. Roberts, 1 Strobh. Eq. 334; Glass v. Ellison, 9 N. H. 69.

[3] Wiley v. Ewing, 47 Ala. 418.

to it. For after a sale to satisfy the mortgage debt, the mortgagee is accountable to the mortgagor or a subsequent or junior mortgagee,[1] and is liable to garnishment by the mortgagor's creditors for the surplus after satisfying the mortgage debt,[2] and if the mortgagee in place of selling the property to satisfy his debt retains it, he must account for it at its market value.[3]

We can therefore arrive at but one conclusion, and that is that a chattel mortgage is neither a sale, absolute or conditional, neither is it more than a pledge, or an absolute pledge, neither does it vest an absolute title in the mortgagee, but that a chattel mortgage, like a real estate mortgage, is nothing but a mere security, a lien upon the property therein described, which the mortgagee may himself, or by an agent, sell for the satisfaction of his debt, and until so sold, or the mortgagor's title is foreclosed, does not vest it in the mortgagee for any other purpose except that of satisfaction; were it otherwise the mortgagor would have no right of redemption after default. The mortgagee would not be accountable for the surplus to the mortgagor, or liable to garnishment by the mortgagor's creditors, nor would he be accountable for it or its value, but could use and dispose of the property as his own were his title absolute after default. No well considered case establishes a doctrine contrary to this, and it is only where there is a full understanding between the mortgagor and mortgagee that the property shall be taken in full discharge of the mortgage debt that his title becomes perfect, and a re-purchase the only method by which the

[1] White v. Dougherty, Mart. & Y. 309; Flanders v. Thomas, 12 Wis. 410; Korns v. Shaffer, 23 Md. 83; Osgood v. Pollard, 17 N. H. 271; Moore v. Aylett, 1 H. & M. 26; Doane v. Garrettson, 24 Iowa, 351.

[2] Doane v. Garrettson, 24 Iowa, 351; Stein v. Herman, 23 Wis. 132.

[3] Craig v. Tappan, 2 Sand. Ch. 78.

mortgagor can be restored to his former rights. So that as long as the mortgagor's rights are not divested by sale or foreclosure he may release the lien by payment or discharge it by a tender of the amount due, and if the mortgagee refuses to accept the loss, the security must fall on him, except in those States where the statute fixes the time in which redemption may be made; any time prior to the sale or foreclosure must therefore be regarded as a reasonable time. There is this difference between chattel mortgages and mortgages of real estate, in regard to the remedies of the mortgagee after forfeiture or breach of condition: In the case of a chattel mortgage, except where statutory provisions prevent, the mortgagee, upon due notice, may sell the property mortgaged, as was the rule under the civil law, and if the sale be *bona fide* will vest the title absolutely in the purchaser. And it makes no difference of what the mortgaged property consists of, as such sale is regarded as equivalent to a foreclosure in equity.

§ 198. **Rights, Liabilities and Remedies of the Mortgagor.**—A debtor, after executing a mortgage upon his property, must act in good faith towards his creditor and others having claims against him. The law will not tolerate the perpetration of fraud upon a mortgagee or upon creditors. A mortgagor, if his property is of a kind that is readily disposed of by sale, and he sells any portion or the whole of it, should apply the proceeds to the satisfaction of the mortgage debt, if he does not the mortgagee, if his mortgage is recorded or filed so as to be notice, may recover the property from any one receiving it, in order to subject it to the satisfaction of his claim. A mortgagor has a perfect right to sell or convey his interest in the property or the property subject to the lien

of the mortgage. There is nothing fraudulent in such a transaction; it does not interfere with the right of the mortgagee nor does it hinder or delay him.[1] A mortgagor has no right to pledge the property to another or create a lien upon it to the prejudice of the mortgagee's right;[2] and if he mortgages the entire property to another without notice of the prior mortgage, and permits the prior mortgagee to take possession, such mortgagor is liable to the first mortgagee in trover for a tortious conversion.[3] Where the property is described as a stock of goods, and there is a provision in the mortgage that it shall be forfeited if any part of the property is sold, the use of the goods will not authorize the mortgagor to sell them or any portion thereof,[4] and if he is permitted by the instrument to make sales of the property in the usual course of trade, such provision does not authorize him to put the mortgaged property into a partnership as his part of the capital;[5] if he does the lien of the mortgage will not be affected.

A mortgagor must act like any prudent owner of property, and if he sell the whole or any portion it is his duty to sell it either subject to the mortgage lien or to apply the proceeds to the satisfaction of the mortgage debt. If the mortgage is made in good faith the mortgagee can protect his lien at any time that it is in danger, and for this reason a mortgagor must so act in regard to his creditor as to give him no cause for obtaining possession of the property and hastening the time of payment. If the mortgagee attempts to take possession of the property before breach of condition, he will be restrained by a

[1] Hodson v. Treat, 7 Wis. 263.
[2] Bissell v. Pearce, 28 N. Y. 252. Miller v. Allen, 10 R. I. 49; Ashmead v. Kellogg, 23 Conn. 76.
[4] Cleaves v. Herbert, 61 Ill. 126.
[5] Alden v. Lincoln, 13 Met. 204; Barnard v. Eaton, 2 Cush. 294.

court. He has no right of possession until he has the right to have his claim paid.[1] If a mortgagee takes possession of the property and converts it to his own use without sale so as to prevent the mortgagor from redeeming the property, the mortgagor will be entitled to a judgment against the mortgagee for the excess of the value over the amount found due on the mortgage.[2] And if the mortgagee takes possession for non-payment he is responsible for the property; and if it be taken from him by a third person and he subsequently recovers possession of it, and has it sold by auction and becomes the purchaser, the value of the property is not fixed by the price obtained at such sale, but the mortgagor is entitled to have its value, at the time the mortgagee first took possession, applied in satisfaction of the mortgage debt;[3] or if the mortgagee after default sells a part of the property mortgaged for sufficient to pay the debt, interest, and expenses, his title is thereby extinguished, and if he afterwards sells the remainder of the property he will be liable therefor in trover.[4]

§ 199. **Mortgagor, when entitled to Relief.**—The doctrine that a mortgage of personal property vests the absolute title in the mortgagee and that after default it becomes absolute, would, if it were sound on principle, give the mortgagor no rights whatever, after default, but an examination of the adjudications establish a doctrine contrary to any such position. An account between the mortgagor and mortgagee and a retransfer of the prop-

[1] Bank v. Gourdin, Spears Ch. 439; Brown v. Phillips, 3 Bush, 656; Ford v. Ransom, 8 Abb. Pr. N. S. 416.

[2] Flanders v. Chamberlain, 24 Mich. 305; Ashworth v. Dark, 20 Tex. 825.

[3] Pulver v. Richardson, 3 Thomp. & C. 436.

[4] Charter v. Stevens, 3 Denio, 33.

erty upon payment of the debt, can be compelled in equity.[1] If a mortgage is given for a specific purpose, it must be exclusively applied to that purpose. Any other disposition of the security is a fraudulent misappropriation against which the mortgagor will be entitled to relief.[2] It is competent for a mortgagor to show, by parol evidence, that the mortgage was given to indemnify the mortgagee for becoming bail for a third party, that he had not become bail or that, having done so, he had been discharged without damage.[3] Where a mortgagee, with a power of sale to pay a debt due, becomes the purchaser and afterwards resells the property at a profit, he is a trustee in the resale for the mortgagor who is entitled to the difference between the first and second sale.[4] And if the mortgagee uses the power his mortgage gives him over the mortgagor to obtain the equity of redemption at less than its value, and for less than others would have given for it, a court of equity will hold the transaction to be still a mortgage and permit the mortgagor to redeem.[5]

In those States where the reformed codes are in use, under that system of administering law and equity, a mortgagor of personal property, or one standing in his shoes, can, when sued for the property mortgaged, claim the right to redeem in his defence to that suit; and where he has not been foreclosed, he may mitigate the recovery against himself, by reducing the judgment to the amount actually due on the mortgage.[6] And if the mortgagee refuses to render an account, without which the mort-

[1] Smith v. Quartz, &c. Co., 14 Cal. 242.

[2] Andrews v. Torrey, 1 McCarter, 385.

[3] Colman v. Post, 10 Mich. 422.

[4] Morrison v. Judge, 14 Ala. 182.

[5] Goodman v. Pledgor, 14 Ala. 114.

[6] Hinman v. Judson, 13 Barb. 629.

gagor cannot ascertain the amount due so as to make payment or tender of the amount due for the redemption of the property, relief will be afforded the mortgagor in equity.[1] After paying the mortgage, if the mortgagee is in possession, or where the mortgagee refuses to accept payment, the mortgagor may recover his property or enjoin the mortgagee from disposing of it.[2] As long as his interest is not foreclosed he has a right, by an equitable action, to redeem[3] if that right is refused. In an action by the mortgagor against the mortgagee for taking and carrying away the mortgaged property, it is a good defence that the money was past due at the time,[4] if the mortgagor seeks to impeach the consideration by showing that the note was given for a less sum of money, and that this sum had been applied according to the directions of the mortgagee, the burden of proof is on such mortgagor.

§ 200. **Liability of the Mortgagor.**—A person who executes a note as evidence of his indebtedness to another and executes a mortgage to secure the payment of such indebtedness cannot, by selling or disposing of the mortgaged property to another, change his liability and make his vendee liable for the debt to the mortgagee.[5] The property is primarily liable for the satisfaction of the debt; if that is converted into money and there is a deficiency, the mortgagor is liable for such deficiency.

§ 201. **When a Mortgagor will and will not be responsible for loss.**—If a mortgagee, after default, obtains possession of the mortgaged property for the purpose of

[1] Boston, &c. Iron Works v. Montague, 108 Mass. 248.

[2] Blanchard v. Kenton, 4 Bibb. 451; Davis v. Hubbard, 35 Ala. 185.

[3] Heyland v. Badger, 35 Cal. 404.

[4] Nichols v. Webster, 1 Chand. (Wis.) 203; Fikes v. Manchester, 43 Ill. 379; Brown v. Phillips, 3 Bush, 656.

[5] James v. Day, 37 Ga. 164; Kelly v. Maxwell, 7 Ohio S. 239.

converting it into money, to be applied to the satisfaction of the mortgage debt, he must dispose of it for that purpose and can not subject the mortgagor to a loss incurred by exchanging the same for other property which is subsequently sold;[1] if he exceed the power conferred by the mortgage, he becomes liable for any loss which results therefrom, unless there be a subsequent ratification of his acts by the mortgagor; but if a loss occurs without any negligence on the part of the mortgagee the loss must be borne by the debtor.[2] If the mortgagor sell the property subject to the mortgage, and the vendee assumes payment of the mortgage and afterwards, without consent of the mortgagor, makes an arrangement with the mortgagee to let the mortgage debt remain and pay interest on it, and the mortgagor requests the mortgagee to foreclose the mortgage and he neglects to do so, and the property is afterwards destroyed by fire, the mortgagor is not liable for the debt.[3] Giving notice to the mortgagee to enforce his security and his refusal relieves the mortgagor of any liability.

**§ 202. Infant Mortgagor cannot avoid the Contract, and maintain an Action against the Mortgagee for conversion.**—Where an infant purchases a chattel and at the same time executes, in performance of the contract of purchase, a mortgage upon the chattel to secure payment of the purchase money, he cannot, on the ground of infancy, avoid the mortgage without also avoiding the purchase. He cannot avoid a mortgage and affirm a sale, made at one and the same time, when both relate to the same property and go to make up one transaction.

[1] Beckley v. Munson, 22 Conn. 299.

[2] Tucker v. Toomer, 36 Ga. 138.

[3] Lochrane v. Solomon, 38 Ga. 286.

If the mortgage be avoided on the plea of infancy, the sale becomes of no effect. Where, therefore, an infant bought a horse and gave back a mortgage for the balance of the purchase money he cannot repudiate the mortgage and keep the horse or maintain an action against the mortgagee for taking the horse by virtue of the mortgage.[1]

[1] Heath v. West, 28 N. H. 101; Richardson v. Bright, 9 Vt. 368; Roberts v. Wiggins, 1 N. H. 73; Curtiss v. McDougall, 26 Ohio, 66.

# CHAPTER XIX.

## FORECLOSURE REMEDIES OF THE MORTGAGEE AFTER DEFAULT OR BREACH OF CONDITION.

VARIOUS REMEDIES TO OBTAIN SATISFACTION OF THE MORTGAGE DEBT.—ANCIENT RULE.—SALE UNDER POWER IN THE MORTGAGE, HOW TO BE MADE.—EFFECT OF SALE.—SALE IN ACCORDANCE WITH STATUTORY PROVISIONS.—NOTICE OF SALE.—ADJOURNMENT OF SALE.—FORECLOSURE BY JUDICIAL PROCESS AND SALE.—PARTIES NECESSARY.—PROCEEDINGS, DEFENCES, &C.—OBTAINING JUDGMENT ON THE MORTGAGE NOTE AND SALE OF THE MORTGAGED PROPERTY ON ORDINARY EXECUTION.—STATUTE OF LIMITATIONS, WHEN A BAR TO MORTGAGEE'S REMEDY.—WAIVER OF MORTGAGEE'S RIGHT TO FORECLOSE.—OF THE PROCEEDS OF THE SALE, &C.

§ 203. Having treated of the rights of the mortgagee we now arrive in regular order at one of the most important portions of our subject, the remedy of the mortgagee to make his security available for the satisfaction of the debt due him by the mortgagor. In considering this branch of our subject we shall ascertain what remedies may be pursued and the manner in which they must be enforced in order to deprive the mortgagor of all interest in the property and how the property is to be converted into money and the mortgage debt satisfied.

§ 204. In the Roman law, if the debt was not paid at the time appointed, the creditor had the right to sell the property without the authority or intervention of a court of justice provided he duly complied with the following conditions. If the contract of hypothecation gave him an

express authority to take possession of the hypothecated property and appropriate it to his use in case of the debtor's default, he might at once seize and sell it. If no such power was given him he was bound to give notice to the debtor of his intention to sell two years before any sale could take place, and the debtor had during all that time the power of redeeming the charge. If he failed so to do, the creditor was, in contemplation of law, the authorized agent of the debtor for the purpose of the sale; and could transfer the right of property and possession of the thing hypothecated to the purchaser by his contract, just the same as any other agent fully authorized by the owner of the property to effect a sale thereof on his behalf. Having received the purchase money, he was at liberty to take therefrom the amount of the charge or debt, and was responsible to the debtor for the surplus. If, on the other hand, the purchase money was insufficient to discharge such debt, the debtor continued responsible for the deficiency. While this rule has been in existence for centuries, and is in fact the rule at the present time, courts have, where there are no statutory provisions regulating the mortgagee's remedy, endeavored to establish a rule entirely different; and there is considerable conflict of authority which is the result of legislation and the absence of legislation on the subject. After making many exceptions and establishing many doctrines, it may be safely laid down as a general principle, that the law is the same at present as it was under the Romans. A mortgagee must do some act by which the mortgagor's title may become foreclosed; and while there are various remedies they arrive at the same result. So that a chattel mortgage is like any other mortgage a mere security and continues a mortgage until the mortgagor's title is barred. If a chattel mortgage were an absolute pledge, or if an absolute title vested

in the mortgagee after default, there would be but one remedy for the creditor, that of recovering possession of his property in case possession was retained of it by the debtor or mortgagor. But a mortgage being a mere security,[1] an incident to the debt, a contract of hypothecation, by which a lien is created upon the property described in the instrument, the mortgagee, on breach of condition or default, may take measures to render such security available if so authorized by the mortgage. Obtaining possession for the purpose of satisfaction by sale is one of the remedies, and as we have treated of the mortgagee's right of possession in case of default or breach of condition in § 94, chapt. 10, Ante, it will not be necessary to restate what is sufficient breach to give the mortgagee this remedy. Any act of the mortgagor which gives the mortgagee a right of action for possession is sufficient cause for enforcing the contract of hypothecation in order to obtain payment of the debt. Many mortgages contain provisions by which any default in payment of principal

[1] Van Brunt v. Walkalee, 11 Mich. 177; Lucking v. Wesson, 25 Mich. 443; Gay v. Bidwell, 7 Mich. 519; Lockett v. Hill, 1 Wood C. C. R. 552; Chick v. Willets, 2 Kas. 384; Ladue v. Detroit R. R. Co., 13 Mich. 380; Watkins v. Wright, 6 McLean, 340; Mussina v. Bartlett, 8 Port. 277; Simms v. Shannon, 19 Md. 296; Brown v. Chase, Walk. (Mich.) 43; Ruggles v. Williams, 1 Head, 141; Bludworth v. Lake, 33 Cal. 265; Phila., &c. R. R. v. Johnson, 54 Penn. 127; U. S. v. Athens Armory, 35 Ga. 344; Jackson v. Lodge, 36 Cal. 28; Fletcher v. Holmes, 32 Ind. 497; Williams v. Beard, 1 S. C. 309; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hildebrand, 46 Mo. 284; Mack v. Wetzlar, 39 Cal. 247; Pease v. Piiot Knob Iron Co., 49 Mo. 124; Darrow v. Kelly, 1 Dall. 142; Anderson v. Neff, 11 S. & R. 208; Wilson v. Troup, 2 Cow. 196; Ryan v. Mersereau, 11 Johns. 534; Bennett v. Taylor, 5 Cal. 502; McMillan v. Richards, 9 Cal. 365; Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, 16 Cal. 559; Fogarty v. Sawyer, 17 Cal. 589; Dutton v. Warshauer, 21 Cal. 609; Davis v. Anderson, 1 Ga. 176; Ryland v. Justices, 10 Ga. 65; Elfe v. Cole, 26 Ga. 197; Seales v. Cashner, 2 Ga. Dec. 76; Hall v. Savill, 3 Iowa, 37; Caruthers v. Humphrey, 12 Mich. 570; Bryan v. Butts, 27 Barb. 503; Thayer v. Cramer, 1 McCord Ch. 395.

or interest, or in case of sale, transfer, removal, &c., by the mortgagor, the whole amount for which the instrument is security shall at once become due and payable. Conditions of this kind are valid and will be enforced; while it may entail hardship upon the debtor, it is simply hastening the time of payment, which is a matter in the exclusive control of the debtor, and may be taken advantage of by the mortgagor as well as the mortgagee. Thus while the contract makes the whole sum due and payable on breach of condition or default, and gives the mortgagee a right of action, the mortgagor may set up the defense of purchaser with notice in case of assignment of the mortgage debt or any portion of it after condition broken; and such breach will start the statute of limitations running so that the benefit of a contract if payable in instalments or making the whole amount of the secured debt payable upon default, may be as beneficial to the mortgagor as it is to the mortgagee. A mortgagee may take measures to render his security available at the first breach or default,[1] but he is not compelled to; he may wait until the time stated in the note or mortgage for its payment before proceeding to obtain satisfaction out of his security.[2] Where a mortgage is made payable at different times, as where the amount secured is divided into instalments of principal, which with the interest are payable quarterly, monthly or semi-annually, and in default of payment of such instalment and interest at the date specified, and the mortgage stipulates that upon such default the whole sum therein secured becomes due and payable, the mortgagee has, if he desires to avail himself of the security, an immediate

1 McConnell v. Scott, 67 Ill. 274; Mussina v. Bartlett, 8 Port. 277.

2 Martindale v. Booth, 3 B. & A. 498; Tapfield v. Hillman, 6 M. & G. 245.

right of action for the whole amount secured.[1] Where a mortgagee holds one mortgage as collateral to another, and the property covered by the principal mortgage is manifestly insufficient to satisfy the debt, he is not bound to wait for the maturity of the principal mortgage and to exhaust his remedy on that before proceeding to enforce the collateral mortgage.[2] And where a mortgagee promises to extend the time of payment of a mortgage in consideration of a note given for a usurious premium, it is void and the mortgage may be foreclosed before the expiration of such extension.[3]

§ 205. Courts, whether of law or equity, do not favor forfeitures and will relieve against them whenever possible, especially in case of mortgages, upon the principle that interest is considered a sufficient compensation for breach of conditions subsequent, when the payment of money is the only condition to be performed; and therefore slight acts on the part of a mortgagee will be considered as a waiver of forfeiture. Thus, a demand of payment of the amount due on the note after it becomes payable is a waiver of forfeiture of the mortgaged property, and the acceptance of part payment or payment in full after the time for payment has expired, is a waiver of the forfeiture under the mortgage.[4] If the mortgagee, after condition broken, receive the whole money from the mortgagor this is not only a waiver of forfeiture, but reinvests the title in the mortgagor without any formal delivery, and if the

[1] Grattan v. Wiggins, 23 Cal. 16; Cecil v. Dynes, 2 Ind. 266; Adams v. Essex, 1 Bibb, 149; Baker v. Lehman, Wright, (O.) 522; Jones v. Lawrence, 18 Ga. 277; McConnell v. Scott, 67 Ill. 274; Magruder v. Eggleston, 41 Miss. 284; Morganstein v. Klees, 30 Ill. 422; Pope v. Durant, 26 Iowa, 233; Salmon v. Claggett, 3 Bland, 125; Smart v. McKay, 16 Ind. 45.

[2] Westervelt v. Haff, 2 Sand. Ch. 98.

[3] Jones v. Truesdell, 23 N. J. Eq. 555.

[4] Greene v. Dingley, 24 Me. 131.

[5] Winchester v. Ball, 54 Me. 558; West v. Crary, 47 N. Y. 423; Leighton v. Shapely, 8 N. H. 359.

mortgagee afterwards detains the property, without sufficient reason, he will be liable in trover.[1] But the receipt of interest by the mortgagee several times after it has become due will not be a waiver of any right to enforce the payment of a subsequent instalment and forfeiture, nor will an agreement to receive part of the instalment before due, but not complied with on the mortgagor's part, produce such waiver.

**§ 206. Of the various Remedies which a Mortgagee has.**—A creditor who takes a mortgage has three remedies to secure his debt, either of which he is at liberty to pursue, and all of which he may pursue until his debt is satisfied. He may bring debt on the note, and after judgment sell the mortgaged property on execution, or sell under the power contained in the mortgage, or in accordance with the statute, or he may foreclose his mortgage in the same manner real estate mortgages are foreclosed.[3] After the mortgage has become forfeited by nonpayment of principal or interest, where any time has been fixed for payment, and where none has been fixed at any time after the lending of the money, the mortgagee, or other person entitled to the mortgage debt, may require payment at as short a warning as he will, or he may file a bill for foreclosure, or sale of the encumbered property.[4] In Indiana it is the proper remedy,[5] and in some States by statutory provision it is made so, while in other States

[1] Leighton v. Shapely, 8 N. H. 359.

[2] The Contributors v. Gibson, 2 Miles, 324.

[3] Jackson v. Hull, 10 Johns. 481; Devons v. Bower, 6 Gray, 126; Chapman v. Hunt, 2 Beasl. 390.

[4] Kemp v. Westbrook, Supp. to Ves. Sr. 141; Dayson v. Morris, 1 Hare, 422; Slade v. Rigg, 3 Hare, 35; Bonham v. Newcomb, 1 Vern. 232; Gladwin v. Hitchman, 2 Vern. 134; Burrowes v. Malloy, 2 J. & Lat. 521; Hall v. Bellows, 3 Stockt. 333; Devens v. Bower, 6 Gray, 126.

[5] Blakemore v. Taber, 22 Ind. 466.

sales made to satisfy the mortgage debt are made by order of a judicial tribunal. Proceedings to foreclose chattel mortgages are properly cognizable in equity.[1] A statute providing for the foreclosure of mortgages is an anomalous one, partaking both of equity and common law principles, as equitable remedies are not created by statute;[2] while a mortgage may contain a power of sale it may nevertheless be foreclosed in a court of equity, and the mortgagee will be protected by the decree if the value of the property be large.[3]

Bills to foreclose chattel mortgages are entertained on the ground that the property may be sold under the direction of the court and all the rights of the parties ascertained and enforced in one proceeding;[4] and the right of a mortgagee to come into a court of equity to obtain a foreclosure of the equity of redemption and a sale of the property, and also to protect the property from conversion or destruction until a sale is well settled,[5] and before his right to foreclose accrues a mortgagee has the right, in case of apprehended danger, to have a receiver appointed;[6] and although the condition of the mortgage be not yet broken, yet the mortgagee may come into a court of equity to prevent the property from being taken by creditors of the mortgagor, and in such a case the mortgagee could have a sale, and have the money, or so much as his mortgage secures, paid into court to await a settlement between him and the mortgagor. But to obtain that relief the bill must be filed for that purpose, as the relief cannot be

[1] Packard v. Kingman, 11 Iowa, 219.

[2] Daniels v. Henderson, 5 Fla. 452.

[3] Long Dock Co. v. Mallory, 1 Beasl. 94; Marriott v. Givens, 8 Ala. 94.

[4] Bryan v. Robert, 1 Strobh. Eq. 33

[5] Freeman v. Freeman, 2 Green, (N. J.) 44.

[6] Rose v. Beavan, 10 Md. 466.

given on a bill to foreclose before condition broken.[1] Or if the mortgagee, not being in possession is obliged to bring his bill in equity, the court may enjoin any sale of the property, or may order it sold and the proceeds brought into court, so that it may be certain that its decree, when rendered, can be executed.[2]

After condition broken a mortgagee has such an interest in the property as will enable him to maintain replevin for it[3] against the mortgagor or any person in possession of the mortgaged property under him and this right may be enforced pending an action of foreclosure.[4] Trover will lie by a mortgagee against the mortgagor, and his agent or consignee, notwithstanding the mortgage stipulated that on or before the maturity of the mortgage debt, the goods were to be shipped by the mortgagor to a factor of his own selection, who was to sell them for the benefit of the mortgagee, if they appropriate them to their own use before or after default.[5] After the expiration of the time for redemption has expired, the mortgagee may bring an action to recover possession of the property,[6] and may, at any time prior to default, bring an action against any one for an unlawful conversion,[7] although not in active possession. A court of equity will interfere by injunction to protect a mortgage of personal as well as real property, against

[1] Long Dock Co. v. Malkory, 1 Beasl. 94; Freeman v. Freeman, 2 Green, (N. J.) 44.

[2] Hall v. Bellows, 3 Stockt. 333.

[3] Brookover v. Esterly, 12 Kas. 149; Wolfley v. Rising, 12 Kas. 535; Brown v. Cook, 3 E. D. Smith, 123; Gilchrist v. Patterson, 18 Ark. 575; Woodruff v. Halsey, 8 Pick. 333; Foster v. Perkins, 48 Me. 168; Brock v. Headen, 13 Ala. 370; Talman v. Smith, 39 Barb. 39; Montgomery v. Kerr, 1 Hill, (S.C.) 291; Greene v. Dingley, 24 Me. 131.

[4] Jones v. Henry, 3 Litt. 46.

[5] Jones v. Webster, 48 Ala. 109.

[6] Hopkins v. Thompson, 2 Port. 433.

[7] Freeman v. Freeman, 2 Green, (N.J.) 44; McCandless v. Moore, 50 Mo. 511.

waste or destruction by the mortgagor in possession, whether default has been made or not;[1] but these extraordinary proceedings are seldom required, as creditors who take chattel mortgages for security insert so many stipulations and conditions that the remedy at law is adequate and complete without resorting to a court of equity. Many of the remedies for disposing of a mortgagor's interest being provided for by the mortgage itself, as by a power of sale contained in the instrument, or by a sale in the manner provided for by statute, proceedings in equity have fallen into desuetude.

**§ 207. Remedy of the Mortgagee by action on the note.**—Of the various remedies by which a mortgagee may obtain satisfaction, where the amount is within the jurisdiction of an inferior court where a speedy judgment can be obtained, we prefer obtaining judgment on the mortgage note and having the mortgaged property sold on execution; in this manner the mortgagor may set up any defense he has and the mortgagee can obtain a fair sale of the property which cannot be questioned as against him; where the amount of property is of considerable value this is one of the most expeditious as well as one of the safest methods of obtaining satisfaction, as no more of the debtor's property is sold than will be necessary and it will be sold to the highest bidder for cash at public auction; this is all that the law requires and it is an inexpensive method as well as a speedy one. A mortgagee does not lose his right to the mortgaged property by obtaining judgment on the mortgage note and then seizing it on execution. The property is pledged as security for the debt and is not taken as a liquidation of it, and a judgment while it may be

[1] Parsons v. Hughes, 12 Md. 1.

a merger of the note so that no other action can be maintained on it, will not extinguish the security, that remains as security for the debt, no matter what form it takes, until the debt itself is extinguished.

There may in many cases be a mortgage of property exempt from execution or attachment, and it may be claimed that an ordinary execution would not reach such property; while this may be true of property which is unencumbered, it does not hold good in cases where the property which is exempt is mortgaged to secure the satisfaction of the debt, as the creditor can sell it without an execution; he can certainly sell it by a third party and why he cannot sell it on execution by a third party who is an officer of a court of justice is a matter that is unexplainable. The mortgagee has the advantage of having a judgment for any deficiency and the mortgagor a guaranty that the property will be sold to the highest bidder and no more sold than is necessary to pay the debt and costs; and a mortgagor cannot maintain trespass against a mortgagee for selling the property mortgaged under a judgment obtained on the mortgage note, although the property, if not mortgaged, would have been exempt from being taken on execution.[1]

Where a mortgagee sues for the mortgage debt, this does not prevent him from pursuing his remedies under the mortgage until the debt is satisfied,[2] and after obtaining judgment on the mortgage note may subject other property of his debtor to its payment.[3] So he may attach or levy on the mortgaged property for a debt not secured

[1] Frost v. Shaw, 3 Ohio S. 270; Dyer v. Cady, 20 Conn. 536; Jones v. Scott, 10 Kas. 33; Thurber v. Jewett, 3 Mich. 295; James v. Day, 37 Iowa, 164; Thornton v. Pigg, 24 Mo. 249; Hamilton v. Bredeman, 12 Rich. Law, 464; Jenkinson v. Ewing, 17 Ind. 507; Butler v. Miller, 1 N. Y. 496.

[2] Satterwhite v. Kennedy, 3 Strobh. 457.

[3] Karnes v. Lloyd, 52 Ill. 113.

by the mortgage[1] and he may waive his claim under the mortgage and may attach the property to secure his debt without violating any of the mortgagor's rights.[2] So he may waive his lien under the mortgage and attach the same property in an action at law.[3] Where a mortgagee attaches the property mortgaged, in an action for another debt due him from the mortgagor, and after judgment satisfies the execution out of the attached property, he thereby waives his right to set up the mortgage against subsequent attaching creditors of the same property.[4] If the mortgage lien is no security for the mortgagee it certainly is no protection to him when other creditors seek to subject his debtor's property; if he can levy upon it and sell it for another debt than that secured by mortgage, any creditor may do the same with the balance of the property; it is either a valid lien as against all unsecured debts, whether due the mortgagee or other creditors, or it is not valid as to any. If a mortgagee elects to treat the property as liable to any debt he may have against the mortgagee, a creditor has the same right to treat it so.

In States where provision is made for a foreclosure of chattel mortgages, in order to bar the mortgagor's title it is held that the proceeding by obtaining a judgment for the mortgage debt and selling the encumbered property in satisfaction of such judgment will not bar the mortgagor's right of redemption;[5] where the distinction is to be made between a sale for the mortgage debt of the mortgaged property, and an execution sale on unencumbered personal property as regards the pur-

[1] Cushing v. Hurd, 4 Pick. 253.
[2] Buck v. Ingersoll, 11 Met. 226.
[3] Whitney v. Farrar, 51 Me. 418.
[4] Haynes v. Sanborn, 45 N. H. 429.
[5] Dabney v. Green, 4 H. & M. 101.

chaser's title is matter that is somewhat difficult to perceive unless it be on the ground, that there must be a foreclosure in a court of equity. In the same case it was held that as the mortgagor undertook to defraud the mortgagee by attempting to remove the mortgaged property out of the State and the mortgagee attached the property and obtained judgment on the mortgage note, that the mortgagor should not be allowed to redeem. Where a party owes a debt and executes a mortgage upon personal property, the debt is not merged in the mortgage so as to prevent an action on the debt and compel the mortgagee to obtain satisfaction out of the property, or causing its sale, and if the proceeds are insufficient to satisfy the debt, then to bring an action to recover the deficiency; he may bring his action on the debt without selling the property first.[1]

No action to recover a debt will lie on a mortgage which contains no agreement to pay any thing, nor any admission that anything is due.[2] Where a mortgage contained a stipulation that general execution shall not issue herein, the mortgagee must look to his security alone for the satisfaction of his debt.[3] A mortgage being an incident to the debt secured by it, in order to maintain an action on the mortgage the debt must first be proved.[4] Where a mortgage to secure a certain note, with a power of seizure and sale, in case of non-payment by a certain time, does not describe the note as negotiable, and there is nothing showing it to be such, it will be presumed, in the absence of any evidence to the contrary, that the mortgagor was indebted to the mortgagee at the expira-

[1] Elder v. Rouse, 15 Wend. 218; Sterling v. Rogers, 25 Wend. 658.

[2] Weed v. Covil, 14 Barb 242; Jenkins v. Wheeler, 2 Abb. Ct. App. 446.

[3] Kennion v. Kelsey, 10 Iowa, 443.

[4] Bennett v. Taylor, 5 Cal. 502.

tion of the time, and entitled to an order of seizure and sale, without producing the note at the time of the application.[1]

**§ 208. Effect of the Statute of Limitations as a bar to an Action of Foreclosure.**—It may seem somewhat strange to discuss the effect of the statute of limitations in regard to chattel mortgages while the principles governing the application of this doctrine is by no means settled or at all uniform in the case of a mortgage of real estate, as to whether an action is barred when the note is or not. The question of the effect of the statute in its application to chattel mortgages may in cases become material. That there can be uniformity in the application of the rule is a matter of great doubt, as it is dependent entirely upon statute law, which controls chattel mortgages, and as the statutes are dissimilar, so must the application of the doctrine be unsettled. In order to ascertain wherein this question becomes important, it will be necessary to learn how long the lien of a chattel mortgage can exist, where no effort is made, upon default or breach of condition, when the mortgage debt becomes payable, to obtain satisfaction of the debt. The statutes in all the States where chattel mortgages are in use provide what is necessary in order to validate a chattel mortgage as against third parties.

In many States there is a provision by which the time is fixed as to the length or duration of the lien as against third parties, but none as against the mortgagor. In some of the States, as we have already shown, Ante, chap. viii., there are provisions for the renewal or extension of the mortgage lien, and in those States the question may, if it has not already arisen, as

[1] Patterson v. Hall, 1 La. Ann. R. 108.

to the effect of the statute of limitations and as to the right of parties other than the mortgagor to plead it. In those States there is a provision that where the mortgagee before and within thirty days of the expiration of a year from the time when the mortgage was filed, it may be extended by a strict compliance with the statute for another year, and if the mortgagee can extend it one year, can he indefinitely? or can he, by an annual extension of his mortgage by an ex parte proceeding, prevent the statute of limitations from acting on the debt and its security. That the ex parte action of a creditor will not prevent the statute from barring an action on a past due claim is well settled; but in case of a chattel mortgage, these State statutes provide that such mortgages may be continued until satisfied, if the law is complied with. In some States a specified time is fixed and no renewal provided for by statute. In other States there is no statutory limit to the duration of the mortgage lien as against creditor or the mortgagor.

The law which governs chattel mortgages having been made for the purpose of protecting creditors and purchasers, has provided for certain forms which are good as against them; but as to the length of time during which such mortgage shall be valid the law is silent. In New York it was held that one compliance with statute in regard to renewal would be sufficient to extend the lien of the mortgage,[1] and that it would be a continuing security. In some States the renewal certificate must be filed annually, while in others the statute is silent on the subject. As we have adopted the rule that a mortgage, whether of real or personal property, is a mere security, an incident to the debt, it necessarily follows that as against the mortgagor, and all persons claiming under

[1] Newell v. Warren, 44 N. Y. 244.

him, and as to all claiming in hostility to the mortgage, as to the latter class, it may be when the statute requirements are complied with, and as to the former without regard to statute, a valid subsisting lien as long as an action can be maintained on the note.[1] In Arkansas the rule adopted is, that where a mortgagor continues in possession after default of payment, the mortgagee or trustee has the same time to bring a bill to foreclose or sell; that would be allowed him under like circumstances to bring an action at law for possession of the property.[2] In other States, that if an action is barred on the note the mortgagee is entitled to bring an action as long as an action will lie for the property.[3] And it is held that where the statutory bar operates on the debt and deprives the mortgagee of his remedy against the property, a revival of such barred debt by a new promise to pay it, will operate as a revival of a mortgage given to secure such debt without words to that effect in the new promise.[4] Persons who omit to set up the statute of limitations can have no protection from it.[5]

[1] Arrington v. Liscomb, 34 Cal. 365; Barroilhet v. Battelle, 7 Cal. 450; Coster v. Brown, 23 Cal. 142; Duty v. Graham, 12 Tex. 427; Haskell v. Bailey, 22 Conn. 569; Heimlin v. Castro, 22 Cal. 100; Heirs of Ross v. Mitchell, 28 Tex. 150; Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; Perkins v. Sterne, 23 Tex. 561; Sullivan v. Hadler, 16 Ark. 129; Morse v. Clayton, 21 Miss. 373; Folsom v. Lockwood, 6 Minn. 186; Chick v. Willetts, 2 Kan. 384; Pollock v. Mason, 41 Ill. 516; Harris v. Miles, 28 Ill. 44; Medley v. Elliott, 62 Ill. 532; Hughes v. Edwards, 9 Wheat. 497; Christopher v. Spark, 2 J. & W. 234; Guthrie v. Field, 21 Ark. 379; Kyger v. Ryley, 2 Neb. 20; Baker v. Evans, 2 Car. L. R. 614.

[2] Ewell v. Tidwell, 20 Ark. 136; Sullivan v. Hadley, 16 Ark. 129.

[3] Demerritt v. Batchelder, 28 N. H. 533; Almy v. Wilbur, 2 W. & M. 371; Craine v. Paine, 4 Cush. 483; Richmond v. Aiken, 25 Vt. 324; Bush v. Cooper, 26 Miss. 599; Choteau v. Borlando, 20 Mo. 482; Wilkinson v. Flowers, 37 Miss. 579.

[4] Perkins v. Sterne, 23 Tex. 561; Harlan v. Bernie, 22 Ark. 217; Newlin v. Duncan, Harr. (Del.) 204; Kimmel v. Schwartz, 1 Ill. 216; Ilsley v. Jewett, 3 Met. 439.

[5] Forham v. Wallis, 10 Hare, 231.

It may be used as a defence either by answer, by plea, or where it appears upon the face of the bill, that the cause of action accrued the full number of limited years before the commencement of the action, by demurrer.

**§ 209. Of the Foreclosure of the Mortgagor's right of Redemption.**—It would appear to be an implied term of contract of hypothecation or pledge that the property hypothecated shall be made available for the liquidation of the debt it was intended to secure in case the debtor is unwilling or unable to pay such debt.[1] The law does not condemn the property to remain useless in the hands of the creditor, or suffer it to perish, but enables the creditor, after due notice given to the mortgagor, and every fair opportunity afforded him to redeem, to sell the hypothecated property and appropriate the proceeds of the sale in liquidation and discharge of the debt, paying over the surplus that may remain to the debtor; or if the value of the property does not exceed the amount of the debt due upon it, and the costs and expenses of a sale, the creditor will be allowed to appropriate it to his own use, and hold it as his own property, discharged of all claim of ownership and right of redemption on the part of the debtor. The ancient form of foreclosing or barring the debtor's right of redemption was by writ of summons, commanding him to redeem the property or appear in court and answer the complaint of the mortgagor and admit or deny the pledge and the debt. If the debtor appeared and admitted the pledge, he was commanded to redeem within a reasonable period; and if he failed to comply, liberty was given to the creditor from that time to treat the property as his own. If the debtor denied the pledge and the debt, the creditor was put to proof thereof.'

[1] Beames v. Glanville, 254 N. 1.

As long as the ownership and the right of property have not been in any way vested in the mortgagee the latter cannot sell more than his own claim and can only transfer his own claim or lien upon the property burdened with the mortgagor's right of redemption, which is a matter of almost daily occurrence, as in the case of the assignment of the mortgage note before maturity or breach of condition. In order to transfer a valid and complete title to the property mortgaged, the mortgagee must bar the mortgagor's right of redemption by the foreclosure in one of the methods recognized, viz., by decree, by sale in accordance with the statute, upon due notice to the mortgagor, or by virtue of a power of sale in the instrument, or in accordance with the latter rule, by an execution sale upon a judgment on the note. Either of these methods will effectually bar the mortgagor's right of redemption. The power of sale in the mortgage or by virtue of the statute, reasonably establishes that the nature of the transaction between the parties was to this effect. If I, the borrower, repay the money, my property is no longer encumbered or pledged as a security for my debt, and, therefore, the mortgage lien will be discharged. If I do not repay it, you may use the security to repay yourself, and after due notice to the mortgagor, the creditor will be entitled to sell the property, and may satisfy the debt from the proceeds of the sale. If the mortgagor, after due notice, fails to redeem or pay the debt, he will be deemed to have authorized the sale, or to be an assenting party thereto.

By the Roman law the contract of hypothecation carried with it an implied authority to sell in case of the non-payment of the debt due thereon. In conducting the sale the creditor was deemed the mandatory or agent of the debtor selling on behalf of the latter; and he was

consequently bound to promote the interest of the debtor to the utmost of his power. He could not become the purchaser of the property either directly or indirectly. An action of eviction from want of title could not be brought against him by the purchaser, but only against his principal, the debtor, unless he sold *mala fide*, or without any right to sell, in which case he was himself responsible for all the damages which resulted from the sale. If, after the property had been offered for sale with the necessary formalities, an acceptable purchaser could not be found, the creditor might then apply to the court to have it appraised and adjudged to him at its value. Still, even in this last case, the debtor had a right of redemption for two years after the decree. If it was made part of the contract that the creditor should be entitled to take the property himself in case of default, at a price to be mutually agreed upon between himself and the debtor, or to be fixed by the court or some third party, this agreement might be enforced as a conditional sale.[1]

By the modern rule if the mortgagor makes default in payment of the mortgage debt at the time appointed, the mortgagee may proceed to sell without taking judicial proceedings to foreclose, and may apply the proceeds in liquidation of the mortgage debt, interest and costs. But he will be ordered to account for and pay over any surplus that may remain. If he does not think fit to sell, he can by obtaining a decree of foreclosure, bar the equity of redemption; and if, after a sale of the property, the proceeds are insufficient to satisfy the debt, interests and costs, the mortgagor is still liable for any deficiency. The same result may be obtained by obtaining a judgment

[1] Dig, Lib. 20; Lib. 13, Tit. 8, Lex. Lib. 42, Tit. 1; Dig. Lib. 20, Tit. 1, 4; Cod. Lib. 4, Tit. 24; Lib. 8, Tit. Lex. 16; Domat. Lib. 2, Tit. 1, §§ 3, 13–34; Cod. Lib. 8, Tit. 22, 34; Dig. 11.

on the mortgage note and causing the mortgaged property to be sold on execution, as the amount of the sale will be credited on the execution, and if the debtor has other property liable to execution it may be taken to satisfy the judgment. The latter mode is not only of a more speedy one than by foreclosure in a court of equity, but it is not liable to the imputation of *mala fides*. The sale being made on judicial process, under the eye of the court, will be made at public auction to the highest bidder, after due notice and the purchaser acquires a perfect title. In all cases where the debt is within the jurisdiction of a justice of the peace, there can be no question in regard to the expediency of this proceeding, nor can there be any question as to the right of the mortgagee obtaining satisfaction of his debt in this manner.

§ 210. **Conflict of Cases as to Foreclosure.**—There are many decisions upon the rights of the mortgagee after default, and of the remedy of both parties to the contract. Upon an examination of the cases it would seem that they are so antagonistic as to be utterly irreconcilable; but this apparent confusion arises from the variety of statutes in force governing this class of securities. In almost all of the States where there has been legislation in regard to the validity and effect of this class of contracts, there is some provision also for foreclosing the mortgagor's title or right of redemption. In New York, and those States which have copied her statute, without any amendment, there is no provision of this kind, and the matter has been left to be determined by the courts. The result of the cases in the absence of such provision has led to the establishment of an arbitrary and unjust rule, that after default a mortgagor has no rights, the title being absolute at law in the mortgagee. The courts in

those States having no statutory provisions regulating the rights of the parties after default, have, instead of following the common law rule which is a re-affirmance or statutory enactment of the doctrines of the court of chancery, established a rule of their own entirely inconsistent with the nature of a mortgage, and the result is an apparent conflict in the decisions. Those courts have established the rule that a mortgagor, notwithstanding his default, has a right of redemption which may be enforced within a reasonable time after such breach in a court of equity, thus recognizing the doctrine that a chattel mortgage does not vest a title free from redemption after default. If the mortgagor has a right to bring an action to redeem there must necessarily be a foreclosure of this right, foreclosure being the converse and reciprocal remedy; one cannot exist without the other, and therefore the right of redemption being a well recognized and established right in such States, the mortgagee must, by a proper proceeding, bar such right; and although not regulated by statute, the proceeding is similar to that in other States, by sale under a power, by statute, or by virtue of the process of a court.

§ 211. **Foreclosure of Chattel Mortgages.**—In treating of this method of obtaining satisfaction of the mortgage debt and disposing of the mortgagor's interest in the property, it will be necessary to divide the subject into two or more sections, as there are various ways of obtaining a foreclosure of the mortgagor's interest. 1st. By an action in a court of competent jurisdiction to obtain a judgment or decree of foreclosure. 2d. By a sale in accordance with the statutory provisions, which is known as a statutory foreclosure. 3d. By a sale under a power contained in and conferred on the mortgagee by

the instrument itself. The right of the mortgagee to foreclose his mortgage and thus bar or cut off the right of redemption is well settled. And this may be done whenever the money secured by the mortgage becomes due, or whenever a default occurs by which the conditions of the mortgage are broken and the right to foreclose becomes operative. As the object of proceeding against the mortgagor after default or breach of condition is to make his property not exempt from execution and unencumbered liable for any deficiency after applying the proceeds of the mortgaged property to the payment of the mortgage debt. The proceedings to foreclose in any of the modes above mentioned is to obtain a complete and perfect title to the property mortgaged the same as if it were real estate; for to obtain this result a mortgagee may file his bill in equity, or upon giving reasonable notice to the mortgagor may sell the property.[1] The statute foreclosure of a mortgage, by giving due notice of sale, is equivalent to a foreclosure in equity.[2] This being a summary manner of foreclosing chattel mortgages, and being specially given by statute, such foreclosure must be effected in the county where the mortgagor resided at the time of the execution of the mortgage,[3] and being ex parte proceedings the directions of the statute must be complied with in all particulars.[4] That a mortgage contains a power of sale does not deprive a court of chancery of jurisdiction to foreclose.[5] A chattel mortgage is an instrument unknown in Louisiana, and therefore cannot be enforced in that State.[6]

## § 212. Foreclosure by Decree or Judgment of a

[1] Hall v. Bellows, 3 Stockt. 333.

[2] Wilson v. Troup, 2 Cow. 195; Jackson v. Henry, 10 Johns. 185.

[3] Brown v. Greer, 13 Geo. 285.

[4] Lee v. Mason, 10 Mich. 403.

[5] Corradine v. Connor, 21 Ala. 573.

[6] Delop v. Windsor, 26 La. 185.

**Court. Proper Parties to a Suit. Effect of Decree. Sale and application of Proceeds.**—The most satisfactory remedy in cases where the mortgage encumbers a large amount of property, or where there are several mortgages upon the same property, is by an action of foreclosure, whereby the rights and interests of all parties may be judicially determined, and a sale made by an officer responsible to the parties and the court. Such a sale must of necessity be fair; it gives all parties an opportunity of bidding, and no more property can be sold than will satisfy the judgment and costs. While it may be more expensive than a sale by the mortgagee, under a power, or by ordinary execution on a judgment rendered for the debt, it is subject to less objection than a sale under a power or by virtue of a statutory provision. In cases where the debt is so large as to be beyond the jurisdiction of courts that are almost continually in session (as justices of the peace), a foreclosure can be had as speedily as an ordinary judgment, so that in such cases there would be no advantage. While many States require that chattel, like real estate mortgages, be acknowledged, several States require that they be foreclosed in a similar manner, while no State prohibits such remedy. A chattel mortgage may therefore be foreclosed, if the mortgagee so elect, whether it contain a power to sell or not.[1]

[1] Hall v. Bellows, 11 N. J. Eq. 333; Broadhead v. McKay, 46 Ind. 595; Blakemore v. Taber, 22 Ind. 466; Woodward v. Wilcox, 27 Ind. 207; Johnson v. Vernon, 1 Bail. 527; Claggett v. Salmon, 5 G. & J. 314; Troy v. Smith, 33 Ala. 469; Branch Bank v. Taylor, 10 Ala. 67; Fowler v. Merrill, 11 How. 375; Merrill v. Dawson, 1 Hempst. 563; Stringer v. Davis, 30 Cal. 318; Pettibone v. Stevens, 15 Conn. 19; Norton v. Ladd, 22 Conn. 203; Smith v. Prince, 14 Conn. 472; Wynn v. Ely, 8 Fla. 232; Daniels v. Henderson, 5 Fla. 452; Guerard v. Polehill, R. M. Charlt. 237; Brown v. Greer, 13 Ga. 285; Holt v. Holt, 23 Ga. 5; Kirkpatrick v. Bank, &c., 30 Ga. 465; Duprey v. Gibson, 36 Ill. 197; Cassel v. Cassel, 25 Ind. 90; Parrott v. Hughes, 10 Iowa, 459; Packard v. Kingman, 11 Iowa, 219; Geither v. Alexander, 15 Iowa, 470; Madison v. Grant, 6 J. J. Marsh. 641.

A bill in equity may be maintained to foreclose a chattel mortgage where there are successive liens and encumbrances on the mortgaged property, and various rights and interests to be adjusted, though, if the amount is small, and there are no adverse claims, or other liens or mortgages, the remedy by notice and sale, or by judgment and sale thereunder of the mortgaged property, is sufficient.[1]

All persons interested in the property should be made parties to the bill to foreclose.[2] A person to whom the mortgagor of chattels has sold them is a proper party defendant; being in possession as owner, it is necessary to join him in order to foreclose his equity of redemption, and to subject the property in his hands to sale.[3]

The bill to foreclose should show of what the property consists, the mortgagor's title or claim of title to it, and that it is within the jurisdiction of the court.[4] Where there is no time of payment specified in the note, or if the note is payable on demand, it may be redeemed or foreclosed at any time.[5] And an allegation that the mortgagor had failed to pay a promissory note, whereby the legal title had become absolute, is a sufficient allegation that the debt was not paid although there are other parties to the note.[6]

The answer of a mortgagor denying the delivery of the mortgage, is not of itself sufficient to overcome the

[1] Dupuy v. Gibson, 36 Ill. 197.

[2] Hall v. Hall, 11 Tex. 526; Van Horn v. Duckworth, 7 Ired. Eq. 261; Martin v. Noble, 29 Ind. 216; Bellock v. Rogers, 9 Cal. 123; Kager v. Weakly, 2 Port. 516; Montcalm v. Smith, 6 McLean, 416.

[3] Triltipo v. Edwards, 35 Ind. 467; DeLeon v. Higuero, 15 Cal. 483; Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, 16 Cal. 569; Hall v. Huggins, 19 Ala. 200; Heyman v. Lowell, 23 Cal. 106; Opling v. Luitjiens, 32 Ill. 23; Reed v. Marble, 10 Paige, 409; Hall v. Nelson, 23 Barb. 88.

[4] Chapman v. Hunt, 1 McCarter, 149.

[5] Wright v. Shumway, 1 Biss. 23; Southwick v. Hapgood, 10 Cush. 119.

[6] Hollinger v. Bank, &c., 8 Ala. 605.

presumption of a delivery arising from the possession of the mortgage duly executed and recorded.[1] But a parol agreement to extend the time of payment may be set up as a defence to a foreclosure suit,[2] and while creditors may set up the fact that as to them the mortgage has lost its lien, this defence cannot be set up by the mortgagor as a defence to a bill to foreclose.[3] Where a tenant gives a mortgage to his landlord as security for rent, the foreclosure of the mortgage will not be restrained on the ground that the premises were unfit for occupancy, or had become out of repair after the commencement of the term.[4] The bill will not be demurrable because the note secured by the mortgage is not exhibited.[5] There is no uniform rule in regard to the production of the note and mortgage upon the trial where a true copy of the instruments are set forth and made part of the pleadings as to whether their execution must be proven or not. It seems, however, to be a well established principle that where the execution of a note, or other written instrument, is not denied under oath, or in such a manner as to deny its execution, &c., the necessity for proof as to its execution is waived by the admission in the pleadings. In so many States, and under so varied a mode of procedure as there is in the States of the Union, uniformity in a matter of this kind cannot be expected. The remedies of the mortgagee being cumulative he may select one where no such question could be raised. The rule that the mortgagee must prove the mortgage debt, to make out his bill. is not

[1] Com. Bank v. Reckless, 1 Halst. Ch. 650.

[2] Dodge v. Crandall, 30 N. Y. 294; Tompkins v. Tompkins, 21 N. J. Eq. 338; Morgan v. Penton 21 N. J. Eq. 381; Trayser v. Trustees, &c., 39 Ind. 556.

[3] Stewart v. Fry, 3 Ala. 573.

[4] Davis v. Banks, 2 Sweeny, 184.

[5] Fenno v. Sayre, 3 Ala. 458.

applicable where he is in possession.[1] It is held that the bill to foreclose need not allege an indebtedness for which the mortgage was given, and if alleged it need not be proved.[2] In Kentucky if it is proved or acknowledged, and properly recorded, it may be read in evidence after its execution without further proof;[3] and in Indiana where it is alleged to have been made by husband and wife, and is set out as an exhibit in a complaint, it may be read in evidence against the wife without its execution being proved.[4] In Illinois a mortgage to secure a note cannot be foreclosed unless the note or bond is produced, or a good reason given for its non-production;[5] and in Wisconsin, that where the party attempts to set forth the conditions of a mortgage in a suit to foreclose, variance is fatal.[6] The party who brings the suit should always be compelled to produce and surrender the note; where a judgment is rendered for the full amount due thereon, it is of no use to any one but the debtor; if the judgment is satisfied the note is, and it can in such case be marked satisfied and restored to its maker. On a bill to foreclose a mortgage given to secure the payment of a bond alleging the loss of the bond, the loss must be proved or the mortgagor will not be compelled to accept a bond of indemnity against it.[7] Where it is proved that the original was lost or destroyed, a foreclosure granted upon a certified copy of the original mortgage with the affidavit of the amount due annexed, it will be valid.[8]

The judgment, in an action of foreclosure, may be ren-

[1] Hull v. Fuller, 7 Vt. 106.
[2] Day v. Perkins, 2 Sand Ch. 359.
[3] Bibb v. Williams, 4 Mon. 579.
[4] Keller v. Boatman, 49 Ind. 104
[5] Lucas v. Harris, 20 Ill. 509.
[6] Ames v. Ames, 5 Wis. 160.
[7] Burgwin v. Richardson, 3 Hawks, 203.
[8] Holt v. Holt, 23 Ga. 5.

dered for the amount due on the mortgage note, personally, as well as for the sale of the property.[1] Where a decree for the sale of the property has been entered, a person in possession, not made a party to the suit, may be ruled into court, and unless he shows a paramount title to the property will be ordered to deliver it up for sale, and such order may be enforced by attachment.[2] The foreclosure of a mortgage operates as a payment of the mortgage debt to the value of the mortgaged property.[3] The mortgage, decree, and report of the officer to sell the property under a decree of foreclosure, are to be taken together as an entire thing, and if the property be described in the mortgage, and the decree follows the mortgage, and the report certifies to the sale of the property described in the decree, the report is sufficiently certain to identify the property without describing it particularly.[4] Where it is sought to subject property to the payment of a junior chattel mortgage which has been sold on a prior mortgage, if it was not shown when the prior mortgage was foreclosed, that it was fraudulent, such foreclosure not only bars the mortgagor's equity of redemption, but also the right of redemption conveyed to such junior mortgagee.[5] In those States where actions to foreclose mortgages are cognizable in courts of chancery only, and a junior mortgagee files a bill in chancery to foreclose a chattel mortgage, and makes the mortgagor a party defendant, to subject property sold under a foreclosure of a prior mortgage to the payment of his debt, and he fails to establish his right to equitable relief against the property, he cannot obtain a decree against the mort-

[1] Rollins v. Forbes, 10 Cal. 299; Rowe v. Table, &c. Co., 10 Cal. 441.

[2] Commonwealth v. Ragsdale, 2 H. & M. 8.

[3] Hunt v. Stiles, 10 N. H. 466; Doe v. McLosky, 1 Ala. 708.

[4] Conger v. Robinson, 12 Miss. 210.

[5] Wylder v. Crane, 53 Ill. 490.

gagor for the payment of his debt, there being a complete remedy at law, unless such relief is prayed for in the bill.[1]

Any interference with the possession of the mortgaged property while it is in the custody of an officer during foreclosure, will not be of any avail to the parties; as where an officer foreclosing a chattel mortgage placed the property in a room belonging to the mortgagor, who surrendered the keys to the custodian. The custodian being absent for a short space of time, left a servant of the mortgagor's in charge, but did not surrender the keys; meanwhile the property was levied on by a creditor of the mortgagor, and it was held that the levy could not be made under such circumstances. While goods in the custody of an officer cannot be taken by virtue of any other process from him as against the debtor, the rule is well settled that where the debtor regains possession of the property by redelivery, or otherwise than as bailee of the officer, it will be subject to judicial process, and in this case that leaving it in charge of the mortgagor's servant in the manner stated was not such a possession of the mortgagor as would make it liable to any other creditor.[2]

The mortgagee has an implied irrevocable license, after foreclosure, to enter in a peaceable and reasonable manner upon the premises of the mortgagor to take away the goods mortgaged. If the premises are a dwelling house, the door being open, and no objection being made, the mortgagee has a right to enter and take away the mortgaged property without previous notice.[3] A mortgagee may, after foreclosure, by a distinct oral agreement, made in the presence of the mortgagor with a third

[1] Wylder v. Crane, 53 Ill. 190. Dorland v. Bradley, 66 Ill. 412.

[2] McNeal v. Emerson, 15 Gray, 384.

party as a purchaser, so waive or open the foreclosure as to render himself liable in tort to such third party for subsequent sale of the property to another.[1]

§ 213. **Foreclosure of Mortgages with a Provision authorizing the Mortgagee to sell the Property in case of Default.**—Chattel mortgages, like mortgages of real estate, may contain a provision authorizing the mortgagee, upon breach of condition, to dispose of the mortgaged property by public sale, and after applying the proceeds in satisfaction of the mortgage debt, costs, etc., account for the surplus to the mortgagor. Such provisions are valid and may be executed without resort to a court[2] for the purpose of foreclosure. A mortgagor may appoint a mortgagee as well as any other person to sell his property for the purpose of satisfying his debts. The power of sale is not the only remedy available to the mortgagee; such a power is merely cumulative, and will not prevent a resort to a court of equity for foreclosure of the mortgage, nor will it prevent an action on the note and sale of the property on execution to satisfy the judgment.[3] Under a power of sale mortgage, the mortgagee may sell by giving notice in accordance with the terms of the instrument.[4] Such sale must pursue strictly as to time and place the stipulations in the mortgage, otherwise the sale will be void.[5] Where a mortgage provides specially how and upon what notice the mortgagee may

[1] Phelps v. Hendrick, 105 Mass. 106.

[2] Hyde v. Warren, 46 Miss. 113; Crocker v. Robertson, 9 Iowa, 404; Leach v. Kimball, 34 N. H. 568; Holmes v. Bell, 3 Cush. 322; Clark v. Whittaker, 18 Conn. 543; Destrehan v. Scudder, 11 Mo. 484; Hawkins v. Hastings' Bank, 1 Dill. 462; Cobb v. Farr, 16 Gray, 597; Jackson v. Turner, 7 Wend. 458; Broadhead v. McKay, 46 Ind. 595; Freeman v. Freeman, 2 Green (N. J.) 44.

[3] Lockett v. Hodge, 9 B. R. 167; Thompson v. Houze, 48 Miss. 445.

[4] Crocker v. Robinson, 9 Iowa, 404.

[5] Hall v. Towne, 45 Ill. 493.

sell, these express provisions preclude all implications upon the subject, and he cannot cut off the equitable right to redeem, if asserted in a reasonable time, by a sale in any other mode, except perhaps by a sale to a *bona fide* purchaser, without notice of the mortgagor's equities.[1] The conduct and fairness of a sale by a mortgagee, and the rights acquired under it, are always open to investigation at the instance of the mortgagor; on this account a sale under judicial sanction is safer, and where the amount is large, advisable.[2] Such sales will be jealously watched, and upon the slightest proof of unfair conduct, or a departure from the power, will be set aside. Everything done by the parties to such sale, calculated to prevent competition, renders it void.[3] A mortgagee, selling under a power of sale in his mortgage, will be held strictly responsible for any prejudice to the mortgagor, arising from any deviation from the provisions governing the exercise of the power and the statute requisitions as to notice.[4] Thus a statement arbitrarily and wantonly excessive in the amount due, will be fatal in the advertisement; but an inconsiderable or slight excess will not;[5] and no title will pass under a sale made in pursuance of a power, unless the conditions thereof are strictly complied with.[6] This will not prevent the mortgagee from employing an auctioneer to make the sale for him; nor will it invalidate such sale, though he is appointed to make it;[7] and the omission of the year in publishing a notice of sale, as where the notice is given November 4th and the sale to take place on Monday, November 25th, was

[1] Flanders v. Chamberlain, 24 Mich. 305.

[2] Freeman v. Freeman, 2 Green (N. J.) 44.

[3] Longworth v. Butler, 8 Ill. 321.

[4] Dana v. Farrington, 4 Minn. 433; Spencer v. Annon, 4 Minn. 542.

[5] Ramsey v. Merriam, 6 Minn. 168.

[6] Smith v. Provin, 4 Allen, 516.

[7] Fogarty v. Sawyer, 23 Cal. 570.

held not to invalidate the sale.[1] Where there is no statutory provision regulating the time for notice, ten, fifteen, and twenty days' notice will be sufficient.[2]

§ 214. **Of the Sale and its Effect.**—A mortgagee, wnether in pursuance of a power of sale in the instrument, or in accordance with statutory provisions, in such States where they have been enacted, may, without foreclosure, upon giving due and reasonable notice, sell and transfer the absolute right to the mortgaged property; actual possession is not essential to support his title.[3] The statutes generally provide what shall be sufficient note in case of a sale; the time varies from ten days to sixty. A sale made under a power in the mortgage, or in accordance with the statute, is a statutory foreclosure, and is equivalent to a foreclosure in equity, and will cut off the mortgagor's equity or right of redemption; it subjects the property to the satisfaction of the debt, and in order to vest a perfect title in the purchaser, the sale divests the interest of both mortgagor and mortgagee.[4] Where the mortgagee sells the property to a purchaser who buys for such mortgage at about one-sixth the cost of the property, such purchaser will not acquire a title to the property divested of the equity of redemption in the mortgagor or a junior mortgagee.[5] A mortgagee has no right to sacrifice the property mortgaged, so as to deprive the mortgagor of a surplus which might otherwise accrue. But the mortgagor, in case of

[1] Waite v. Dennison, 51 Ill. 319.

[2] Wilson v. Brannon, 27 Cal. 258.

[3] Chapman v. Hunt, 2 Beasl. 390; Bryant v. Carson, &c. Co., 3 Nev. 313; Hall v. Bellows, 3 Stockt. 333; Wilson v. Brannan, 27 Cal. 258; Freeman v. Freeman, 2 Green (N. J.) 44; Longworth v. Butler, 8 Ill. 321; Bird v. Davis, 1 McCarter, 167; Broadhead v. McKay, 46 Ind. 495; Johnson v. Hanon, 1 Bailey, 527.

[4] Talman v. Smith, 39 Barb. 390.

[5] Alger v. Farley, 19 Iowa, 518.

a sacrifice, has no remedy at law for damages on such sale; his remedy is in equity.[1] Where the property sold is so commingled with other property from which common sales were made that practical certainty is not attainable as to what the goods were sold for, courts of equity will not enter into the field of speculation or doubt, but will ascertain the measure of damages, to which a mortgagor offering to redeem is entitled, by any reasonable certain measure presented by the positive evidence in the case. If the sale be irregular, and not such as to foreclose the mortgage, it will operate as an assignment of the mortgage to the purchaser.[2] But where a sale is made and the property by reason of sacrifice fails to realize enough to pay the mortgage debt, it will be a good defence in action to recover the balance of such debt, that if the sale had been made *bona fide* the property would have sold for more than enough to pay the debt.[3] No greater amount of property should be sold than will satisfy the debt and expenses. If the property can be separated, and it exceeds the debt, no more ought to be sold than will pay the principal, interest and costs.[4]

The creditor will be held at his peril to deal fairly and justly with the property, both as to time of notice and manner of sale. If the mortgagor can show that the property was sold unfairly or at an under price, he will be permitted to do so, and will be allowed its full value.[5] A provision in the mortgage that the property shall be sold for cash, is for the benefit of the mortgagee. He may waive it and sell for credit; if he does, it is at his own risk; and he will be held to have waived it by a

[1] Stoddard v. Dennison, 7 Abb. Pr. N. S. 309.

[2] Walker v. Stone, 20 Md. 195; Alger v. Farley, 19 Iowa, 518.

[3] Howard v. Ames, 3 Met. 308.

[4] Delabigare v. Bush, 2 Johns. 490.

[5] Bird v. Davis, 1 McCarter, 467.

voluntary and absolute delivery of all the property to the purchaser without demanding payment, the property will pass as completely as if had paid the price.[1] But where a mortgagee exercises full control over the property after the sale to a purchaser, and does not account to the mortgagor for the proceeds, such sale will be set aside; as where a corporation mortgaged all its property to its president, with authority to sell it, and he sold it at private sale to his son, taking in payment his note, payable in a year, for the purchase money, and then himself continued to manage and control the property, and did not account to the corporation, such sale was set aside as invalid.[2]

**§ 215. Sale may be Adjourned.**—A mortgagee, in the execution of a power of sale in a mortgage of chattels, has a right, in the exercise of a reasonable discretion, to adjourn the sale from time to time without doing so through the agency of a licensed auctioneer or giving any new notice to the mortgagor.[3] And where such mortgage provides for the payment of the debt, and also the expenses of the sale, but is silent as to compensation of the mortgagee for the care of the property, he is entitled to none for his care.[4]

**§ 216. Mortgagee may employ Agent to make the Sale.**—If the mortgagee, after condition broken, has an officer, as a constable or sheriff, sell the property, in place of making the sale himself, such officer is the agent of the mortgagee, and does not act in any official capacity; he derives his authority from the mortgagee,

[1] Murray v. Vanderbilt, 39 Barb. 140.

[2] Williams v. Hatch, 38 Ala. 338.

[3] Hosmer v. Sargent, 8 Allen, 97.

[4] Imboden v. Hunter, 23 Ark. 622.

just as any agent would, and is not under the control or direction of a court; and no court can exercise any control over the proceeds or the surplus, so as to order its payment to an execution creditor.[1] After a sale is made, the title of the mortgagor is divested, and although the purchaser and mortgagee may agree to rescind the sale, it will not annul the foreclosure effected by the sale, nor will it reinvest the mortgagee with his former rights or title as mortgagee.[2]

§ 217. **Doctrine in New York.**—It is held in New York, notwithstanding the doctrine that a mortgagor's title is divested by default, that where a mortgage contains a power to the mortgagee to take possession and sell the property in default of payment when due, and to take possession and to sell at public or private sale, at any time before the day of payment, in case the mortgagee shall feel himself unsafe, the mortgagee is authorized to sell at private sale, after default in payment, without notice to the mortgagor; and that if such sale is fair and *bona fide*, the mortgagor's right to redeem will be foreclosed. But while thus recognizing a right of redemption in the mortgagor, the inconsistent view is adopted, that a mortgagor cannot compel an accounting, and obtain the surplus if any exists, or prove that the value of the property is more than was realized by the sale;[3] while in another case the same principles are adopted with the additional limitation, that only in case of a sale and a surplus does a trust enure for the benefit of the mortgagor, and the establishment of the doctrine, that after default the mortgagee *may keep the property*

[1] Robins v. Ruff, 2 Hill (S. C.) 406.

[2] Williams v. Hatch, 38 Ala. 338.

[3] Ballou v. Cunningham, 60 Barb. 425; Chamberlain v. Martin, 43 Barb. 657.

*without selling it under the mortgage*, and if the property is ten or even a hundred times the amount of the debt the mortgagor has no claim for the excess of such value.[1] So where a mortgage contained a provision that upon default of payment of the mortgage debt at the time agreed on, the mortgagee might sell the property at auction or private sale and pay the debt and expenses out of the proceeds. It was held, that such provision did not change the construction of the mortgage, but the mortgagor's title became absolute in law, upon default of payment, without any sale being made; that a power to sell, inserted in a mortgage, did not extend the time of payment specified in the mortgage, nor under any circumstances *to reinvest* the mortgagor with title to the property.[2] While this doctrine seems to be well settled and adopted in various States whose courts have blindly followed the rule as established in New York, which rule originated in an undecided and improperly reported case, it has been followed without questioning its justness or reason. As we have fully treated of the matters which justify us in declaring the rule illegal, under the head of "Title of the Mortgagor," it will not be necessary to repeat it here. And we therefore state, that the right of the mortgagee is no greater after default than it is the day prior to such breach of condition; he occupies the position of a creditor whose debt is secured by lien, and until he has rendered his lien available, by selling the property in satisfaction of it, the mortgagor has a right to discharge the lien. If the decisions in regard to the mortgagee's title were uniform, or even based on any reasonable or just ground, it would be difficult to overcome them. But while the decisions

[1] Olcott v. Tioga R. R., 40 Barb. 179.

[2] Burdick v. McVanner, 2 Denio, 170.

all agree that the mortgagee becomes the absolute owner upon default, many of them modify the rule and seek to establish a principle somewhat antagonistic to it which, when examined, is based upon the doctrine that all the mortgagee is entitled to is his money, interest, and costs, and not the property at all; and the rule that such cases lay down is, that where the mortgagee, after default, sells the property under a power of sale (or under a statutory power, as it makes no difference how it is sold) he is accountable to the mortgagor for the surplus, after all reasonable costs and the debt is paid;[1] and that, in justice and equity, all the mortgagee is entitled to or can require, is his *debt* and costs.

**§ 218. When a good Title will pass at a Sale.**— The doctrine of estoppel is applicable to sales under chattel mortgages as well as under real estate mortgages, and a mortgagor who stands silently by, or acquiesces in a sale of his property, under a void or satisfied mortgage, or allows a mortgagee to foreclose such a mortgage, will be estopped from setting up any title as against the purchaser. A man may sell his property in any way he sees proper to; he may sell it at private or public sale, either in person or by an agent. Thus, where a mortgage was without consideration, and the mortgagee foreclosed it by a sale, at which A purchased, paying a small amount in cash and the balance by note, the mortgagor, being present, made no objection to it; a creditor afterwards obtained judgment and levied on the goods; it was held, the sale passed a good title by reason of the

[1] Flanders v. Thomas, 12 Wis. 410; Smith v. Coolbaugh, 21 Wis. 427; Charter v. Stevens, 3 Denio, 33; Bryan v. Roberts, 1 Strobh. Eq. 342; Hinman v. Judson, 13 Barb. 629; Pettibone v. Perkins, 6 Wis. 616; Korns v. Shaffer, 27 Md. 83.

acquiescence of the mortgagor, notwithstanding the want of consideration that the creditor stood in no better position than the mortgagor, unless he could show that the whole transaction was a device to defraud creditors.[1] So a sale and delivery of mortgaged property by the mortgagee, when he is in lawful possession by virtue of a voluntary surrender by the mortgagor, will transfer all his rights as mortgagee, and this will entitle his vendee to take and hold possession, as against the mortgagor, until the debt is tendered or paid, or his right of redemption is barred.[2] But a sale of personal property by the mortgagee before foreclosure, is a conversion for which the mortgagor may maintain an action.[3] Where a mortgage is made to two creditors, to secure their separate claims, a sale may be made by either creditor, after condition broken, and a purchaser will become tenant in common with the other creditor.[4]

**§ 219. A Mortgagee may Purchase at a Sale under the Mortgage.**—A mortgage of personal property does not fall within the principle which forbids a trustee from purchasing at his own sale; if he does, the burden is on him to show the fairness of his own sale.[5] The mortgagee of a chattel may purchase at a sale under the mortgage. Such a purchase is valid, and is voidable only in equity at the election of the parties interested. If the sale is made by virtue of an execution, in place of a power in the mortgage, the mortgagee may purchase the property, if he is the highest bidder, whether enough

[1] Allen v. Cowan, 23 N. Y. 502, Ante, chap. xii.
[2] Sirrine v. Briggs, 31 Mich. 443.
[3] Spaulding v. Barnes. 4 Gray, 330.
[4] Wilson v. Brannon, 27 Cal. 258.
[5] Black v. Hair, 2 Hill Ch. 622; Olcott v. Tioga R. R. Co., 27 N. Y. 546; Bean v. Barney, 10 Iowa, 498; Lyon v. Jones, 6 Humph. 533; Blythe v. Richards, 10 S. & R. 261

is realized to satisfy the mortgage debt or not; he occupies the same position as any plaintiff does in an ordinary action. If the mortgagee appoint an agent to purchase the property at a sale thereof, no person but the mortgagor can complain.[1] The relation which such creditor or mortgagee holds to the debtor, imposes on him the observance of fairness and good faith, and if he abuses the power which he holds and becomes the purchaser, he will be regarded as holding the property only as security for his debt;[2] but where there is a collusive sale for the benefit of the mortgagee, the sale is void.[3] In Maryland, a purchase by the mortgagee at his own sale is void. The general rule is that a mortgagee may purchase, and it is not against public policy; it tends to create competition, and is beneficial to the mortgagor, as he thereby realizes a better price for his property, and the mortgagee may obtain complete satisfaction of his debt. But all sales made under a power, to be valid must strictly comply with its terms.[4] When the power has been executed by a valid sale, in pursuance of its terms, the sale passes an absolute title to the purchaser, free from any right of redemption.[5] While the contract of hypothecation, at its inception, provides for an easy, speedy and inexpensive remedy upon default, by pro-

[1] Edmondson v. Welch, 27 Ala. 578; Richards v. Holmes, 18 How. 143; Parmenter v. Walker, 9 R. I. 225; Benham v. Rowe, 2 Cal. 387; Roberts v. Fleming, 53 Ill. 196; Hall v. Towle, 45 Ill. 493; Griffin v. Marine Co., 52 Ill. 130.

[2] Lyon v. Jones, 6 Humph. 533.

[3] Pettibone v. Perkins, 6 Wis. 616.

[4] Wing v. Cooper, 37 Vt. 169; Cranston v. Crane, 97 Mass. 459; Bourty v. Mitchell, 7 Gray, 243; Smith v. Provin, 4 Allen, 518; Bradley v. Chester Valley R. R., 36 Penn. 141; Simson v. Eckstein, 22 Cal. 590; Michell v. Bogan, 11 Rich., 686; Walthall v. Rives, 31 Ala. 91.

[5] Brackett v. Baum, 50 N. Y. 8; Bloom v. Van Rennsalaer, 15 Ill. 503; Capron v. Attleborough Bank, 11 Gray, 492; Hyman v. Devereux, 63 N. C. 624; Montague v. Dawes, 12 Allen, 397.

viding for a sale to be made by the mortgagee of the property encumbered, for the purpose of satisfying the debt, this provision does not in any manner interfere with or prevent the remedy by suit or action on the note, or for a foreclosure of the mortgage; it is a mere cumulative remedy.[1]

**§ 220. Application of the Proceeds of Sale.**— After a sale of the mortgaged property has been made, the proceeds should be applied in the discharge of the mortgage debt. But where a mortgage is made to secure a promissory note payable in instalments the mortgagee has a right to apply the proceeds realized, under a power of sale contained in the mortgage, towards the payment of any instalments which may be due, at his option, if there is no agreement to the contrary.[2] Where the mortgagee is a creditor of the mortgagor, and accepts a mortgage as well for his own benefit as for the indemnity of sureties of the mortgagor he is bound to appropriate the proceeds of the mortgaged property *pro rata*.[3] But where a debtor executes two or more mortgages to the same creditor to secure different debts upon distinct lots of personal property, and the property under a second or third mortgage is sold by the consent of both parties, and the proceeds are not enough to satisfy all the mortgages, the mortgagee has the absolute right to apply the proceeds realized from the sale to the satisfaction of that mortgage debt which the property was intended to secure, and the mortgagor cannot compel him to apply it in satisfaction of any other. As where a mortgage is given to secure one debt on a team of horses and another mort-

[1] Walton v. Cody, 1 Wis. 420; Carmerais v. Gennella, 22 Cal. 116; Marriott v. Givens, 8 Ala. 694; Carradine v. O'Connor, 21 Ala. 573; Morrison v. Bean, 15 Tex. 267; Thompson v. House, 48 Miss. 444.

[2] Saunders v. McCarty, 8 Allen, 42.

[3] Willis v. Caldwell, 10 B. Mon. 199.

gage is given, to secure another distinct debt, upon a lot of cattle and hogs, and the mortgagor, with the consent of the mortgagee, sells the cattle and hogs, he cannot compel the mortgagee to apply the proceeds in the satisfaction of the first mortgage and thus release that, but as he has pledged the specific property for the payment of a specific debt, he has no right to change it unless the mortgagee consents.[1] Where, upon a dissolution of a partnership, one of the partners purchased the interest of the others, giving therefor his notes, together with a mortgage upon the property, purporting to be given to secure the mortgagee "for his liability on the partnership debts and for his liability to pay any other debts for the mortgagor and for the ultimate payment of the above described notes," and upon sale of the mortgaged property the proceeds were paid to the mortgagee, it was held that such proceeds must be appropriated first to indemnify the mortgagee for partnership debts paid by him and that the residue should be applied to the payment of the notes;[2] and where a mortgage is made, on property bought by a corporation *ultra vires*, partly to secure advances made by a stockholder and partly to secure other claims, and the mortgagee sells the property pursuant to a power in the mortgage, he cannot claim the whole amount of his debt on the ground that the mortgage was illegal, but must apply the proceeds of the sale *pro tanto* to its discharge.[3] So where mortgages of real and personal property were made by and to the same parties, by different instruments, at the same time and to secure the payment of the same debt, with a provision in the latter that if the mortgagee should take possession of the mortgaged property, for a breach of condition, it should be lawful for the mortgagee,

[1] Masten v. Cummings, 24 Mis. 623.
[2] Low v. Allen, 41 Me. 248.
[3] Parish v. Wheeler, 22 N. Y. 494.

or his assignee, to cause the same to be sold at auction, and to apply the proceeds, after deducting the expenses, to the payment of the debt; the mortgagee subsequently assigned his interest in both mortgages to the same assignee. The right in equity to redeem the real estate mortgaged was attached and sold on execution; the assignee subsequently took possession of and sold the personal property, under the provision above mentioned; and the purchaser of the equity brought a bill to redeem against the assignee. It was held that the plaintiff was entitled to have the proceeds of such sale, or, if the sale were not fairly conducted, the amount at which the property might have been sold at a fair and *bona fide* auction applied to the payment of the debt secured by the mortgage of the real estate.[1] And where a copartnership mortgaged to sundry creditors certain personal property, with power to sell the same, and after deducting charges and expenses to apply avails in payment of their respective debts. A and B, a co-partnership who were embraced in the mortgage, took possession of all the mortgaged property, with consent of the other mortgagees. Prior to the execution of the mortgage the mortgagors, having a lien upon forty-five bales of sheetings, attached the same upon a debt due them from the owner. The said co-partnership of A and B gave the officer who served the attachment a bond for the delivery of the sheetings to him on the termination of the suit upon which they were attached, and took possession of the same. Both the debt upon which the suit was brought, and the sheetings, were included in and transferred by the mortgage. Such interest in the sheetings as remained in the owner was also subsequently assigned by him to the mortgagees; and the bond of A and B, given upon the attachment, was, upon such assignment,

[1] White v. Brown, 2 Cush. 412.

cancelled. A and B subsequently sold the sheetings and received the proceeds, upon a bill in equity, brought against A and B by a part of the mortgagees in behalf of themselves and their co-mortgagees, praying for a decree ordering them to render their account of the proceeds arising from the sale of the property conveyed by said mortgage, and to pay over to the mortgagees their respective proportions thereof; it was held, 1st, that as the amount of the share of such proceeds belonging to each mortgage, could only be ascertained by a court of equity, such bill was properly brought. 2d, that A and B, in the sale of said sheetings, having acted as the trustees of the other mortgagees, could not afterwards repudiate that character; and therefore that the proceeds, arising from such sale, were to be divided *pro rata* among all the mortgagees.[1]

[1] Norton v. Ladd, 22 Conn. 203.

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